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I. Introduction

Confidentiality is central to the practice of law. Indeed, confidentiality is a substantial part of the bedrock on which both litigation and transactional practices are built. Lawyers' duty to protect client communications and information is variously embodied and enforced: the attorney-client privilege is a critical component of evidence law, the work product doctrine provides important immunity against the discovery of attorneys' files and mental impressions, and state ethics rules make confidentiality a professional responsibility concern. Of these three aspects of confidentiality, none is as widely accepted or enduring as the attorney-client privilege. Even so, there seems to be a sense among lawyers that the attorney-client privilege is eroding—they can no longer assure themselves or their clients that confidential communications can in fact be shielded from adversaries.[1]

Lawyers' unease about the strength of protection afforded by the attorney-client privilege traces back to 1999, when then-Deputy Attorney General Eric H. Holder, Jr. distributed a memorandum addressing the federal prosecution of corporations to all United States Attorneys and senior lawyers within the Department of Justice.[2] The "Holder Memorandum," as it came to be known, "provides guidance as to what factors should generally inform a prosecutor" in deciding whether to charge a corporation with a crime in a particular case.[3] One of the factors to be considered is a "corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges."[4] The Holder Memorandum further provides that in "gauging the extent" of a corporation's cooperation, federal prosecutors may consider the company's willingness "to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges."[5] The Holder Memorandum was followed in 2003 by the "Thompson Memorandum," in which then-Deputy Attorney General Larry Thompson reinforced and reiterated many of the same points.[6]

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1. *See* Molly McDonough, *Flying Under the Radar,* A.B.A. J., Jan. 2005, at 34, 36 (identifying the erosion of the attorney-client privilege as a critical current legal issue "that will affect the justice system and the legal profession").

2. Memorandum from the Deputy Attorney General of the United States of America, to All Component Heads and United States Attorneys (June 16, 1999), *available at* http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html.

3. *Id.* at 1.

4. *Id.* at 3.

5. *Id.* at 6.

6. *See* AM. BAR ASS'N, TASK FORCE ON THE ATTORNEY-CLIENT PRIVILEGE, REPORT 14-15 (2005), *available at* http://www.abanet.org/buslaw/attorneyclient/home.shtml (last

In addition to the policies expressed in the Holder Memorandum and Thompson Memorandum, the federal government has laid siege to the attorney-client privilege and work product immunity by attacking them in ex parte proceedings via crime-fraud exceptions[7] and by deeming their waiver to be "cooperation" for purposes of avoiding regulatory action or civil penalties.[8] In early 2004, the United States Sentencing Commission approved new guidelines, providing that in some circumstances a corporation may be required to waive the attorney-client privilege and work product immunity to satisfy the requirements of cooperation and minimize any criminal penalty.[9] Although this blow to the privilege and work product immunity has been softened by a subsequent Supreme Court decision rendering the federal sentencing guidelines advisory,[10] corporate counsel remain justifiably concerned about the guidelines' effect.[11]

Events on the civil front have been no more reassuring. Corporate scandals have brought lawyers' confidentiality obligations to the forefront in unflattering ways, leading to suggestions from various groups that investor and public confidence in the financial markets demand that lawyers favor disclosure over confidentiality when presented with instances of possible client misconduct.[12] Additionally, electronic discovery issues and the transmission of documents in electronic form have revealed new ways in which the attorney-client privilege may be inadvertently waived, or in which client confidentiality may be compromised.[13]

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visited July 22, 2005).

7. AM. COLL. OF TRIAL LAW., THE EROSION OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IN FEDERAL CRIMINAL INVESTIGATIONS 3 (2002).

8. *See SEC Issues Report of Investigation and Statement Setting Forth Framework For Evaluating Cooperation In Exercising Prosecutorial Discretion*, SEC Release No. 2001-117 (Oct. 23, 2001) (discussing a report identifying four broad measures of a company's cooperation with the Securities and Exchange Commission causing the SEC to decide against enforcement action related to the company's "financial statement irregularities" to include "providing the Commission staff with *all* information relevant to the underlying violations and the company's remedial efforts") (emphasis added), *available at* http://www.sec.gov/news/press/2001-117.txt (last visited May 28, 2005).

9. *See Sentencing Commission Approves Changes to Guidelines Pertaining to Oragnizations*, 20 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 207 (Apr. 21, 2004).

10. *See* United States v. Booker, 125 S. Ct. 738 (2005).

11. *See* Leonard Post, *Eroding Privilege Hurts Corporate Compliance*, NAT'L L.J., Apr. 25, 2005, at 6 (discussing this issue and related concerns).

12. For a thoughtful and balanced analysis of the disclosure obligations of lawyers practicing before the SEC, *see* Giovanni P. Prezioso, Speech by SEC Staff: Remarks before the American Bar Association Section of Business Law 2004 Spring Meeting (Apr. 3, 2004), *available at* http://www.sec.gov/news/speech.shtml#staff04.

13. *See* Terry L. Hill & Jennifer S. Johnson, *The Impact of Electronic Data upon an Attorney's Client*, 54 FED'N DEF. & CORP. COUNS. Q. 95, 106-12 (2004) (discussing

In fact, the attorney-client privilege has always been narrowly construed and enforced,[14] and it has always been capable of being waived by almost any voluntary disclosure running contrary to its assertion.[15] In many instances lawyers too casually assume the application of the privilege, or do not appreciate the ease with which it may be waived.[16] Similarly, lawyers often are too quick to assume the application of the work product doctrine, and many do not appreciate the broad confidentiality obligation imposed by state ethics rules. It is against this backdrop that this Article examines the current contours of the attorney-client privilege and related confidentiality concerns.

Looking ahead, Section II discusses fundamental aspects of the attorney-client privilege, the work product doctrine, and lawyers' ethical duty of confidentiality. Section III discusses privilege and work product in the employment of public relations consultants. Parties in high profile cases do battle in court and in the press, and public relations consultants are often involved in litigation-related decisions. Section IV examines an important subject in light of recent corporate scandals and related reforms: attorneys' communications with clients' auditors, and the associated effect on the attorney-client privilege and work product immunity. Because parallel government and civil proceedings are now a fixture on the litigation landscape, Section V examines the selective waiver doctrine. Section VI discusses privilege and work product in common interest arrangements. Section VII examines recent developments in the law of inadvertent waiver, a serious and recurring issue for litigants. Recognizing the role technology now plays in legal practice, Section VIII discusses the transmission and receipt of invisible information in electronic documents. Section IX briefly examines whether the cooperation clauses found in most insurance policies waives the insured's attorney-client privilege in a dispute with the insurer. Finally, Section X analyzes waiver of the attorney-client privilege by trustees, examiners, liquidators and receivers.

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inadvertent waiver of privilege and work product immunity in electronic distribution of information); David H. Bernstein & D. Peter Harvey, *Ethics and Privilege in the Digital Age,* 39 TRADEMARK REP. 1240, 1266-77 (2003) (discussing privilege, work product and waiver in the digital age).

14. *See, e.g.*, People v. Urbano, 26 Cal. Rptr. 3d 871, 874-76 (Cal. Ct. App. 2005) (holding that privilege did not apply to defendant's statements to lawyer in courtroom made so loudly that they could be easily overheard by others).

15. Gray v. Bicknell, 86 F.3d 1472, 1482 (8th Cir. 1996); Profit Mgmt. Dev., Inc. v. Jacobson, Brandvik & Anderson, Ltd., 721 N.E.2d 826, 835 (Ill. App. Ct. 1999).

16. *See* Lugosch v. Congel, 219 F.R.D. 220, 235 (N.D.N.Y. 2003) (explaining that "[c]ontrary to modern and ill-informed perceptions," the attorney-client privilege is narrowly construed and "riddled with exceptions," and that it is a "less than sacrosanct rule" subject to "waivers upon waivers").

II. Privilege, Immunity and Confidentiality

Confidential communications between attorneys and clients are protected from discovery by the attorney-client privilege, and often by work product immunity. These doctrines are separate and distinct from lawyers' duty of confidentiality under ethics rules.

A. The Attorney-Client Privilege

The attorney-client privilege is one of the oldest common law privileges protecting confidential communications,[17] and it has now been widely codified. The privilege is intended to "ensure full disclosure by clients who feel safe confiding in their attorney."[18] Only full and frank communications between clients and their attorneys allow attorneys to provide effective, expeditious and informed representation.[19] Additionally, recognizing the privilege encourages the public to seek early legal assistance.[20]

The leading privilege test was announced years ago in *United States v. United Shoe Machinery Corp.*[21] The *United Shoe* test provides that the privilege applies if:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is the member of the bar of court, on his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal preceding, and not (d) for the propose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[22]

Although the *United Shoe* test implies that the privilege covers only communications from the client to the attorney, that is not the case; confidential communications from an attorney to a client are also

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17. Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998); *see also* Wemark v. State, 602 N.W.2d 810, 815 (Iowa 1999); *In re* Miller, 584 S.E.2d 772, 782 (N.C. 2003); Doe v. Maret, 984 P.2d 980, 982 (Utah 1999).

18. Lane v. Sharp Packaging Sys., Inc., 640 N.W.2d 788, 798 (Wis. 2002).

19. *See In re Miller*, 584 S.E.2d at 782-83 (quoting and citing cases).

20. McLaughlin v. Freedom of Info. Comm'n, 850 A.2d 254, 258 (Conn. App. Ct. 2004); Genova v. Longs Peak Emergency Physicians, P.C., 72 P.3d 454, 461-62 (Colo. Ct. App. 2003) (quoting Nat'l Farmers Union Prop. & Cas. Co. v. Dist. Court, 718 P.2d 1044, 1047 (Colo. 1986)).

21. 89 F. Supp. 357, 358-59 (D. Mass. 1950).

22. *In re* Sunrise Sec. Litig., 130 F.R.D. 560, 595 (E.D. Pa. 1989) (quoting *United Shoe* and *In re* Grand Jury Investigation, 599 F.2d 1224, 1233 (3d Cir. 1979)).

privileged.[23] Both clients and lawyers are "privileged persons."[24]

The right to assert the privilege belongs to the client;[25] the privilege exists for the client's benefit.[26] The privilege attaches to initial consultations between prospective clients and attorneys, even if the attorney is not ultimately retained.[27] Thereafter, the client may invoke the privilege at any time during the attorney-client relationship, or after the relationship terminates. The privilege even survives the client's death.[28]

There is no blanket privilege covering all attorney-client communications.[29] The client must claim the privilege with respect to each communication at issue, and a court examining a party's privilege claims must scrutinize each communication independently.[30] The party asserting the privilege bears the burden of establishing its application to particular communications.[31] The form of the communication is irrelevant to privilege analysis so long as the communication is intended to be confidential; it is the act of communicating that counts. For example, e-mails may be privileged,[32] even if they are not encrypted.[33]

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23. Lewis v. UNUM Corp. Severance Plan, 203 F.R.D. 615, 618 (D. Kan. 2001) (discussing federal common law attorney-client privilege); Byrd v. State, 929 S.W.2d 151, 154 (Ark. 1996); Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co., 730 A.2d 51, 60 (Conn. 1999); Clausen v. Nat'l Grange Mut. Ins. Co., 730 A.2d 133, 137-38 (Del. Super. Ct. 1997); Squealer Feeds v. Pickering, 530 N.W.2d 678, 684 (Iowa 1995); Rent Control Bd. v. Praught, 619 N.E.2d 346, 350 (Mass. App. Ct. 1993); Palmer v. Farmers Ins. Exch., 861 P.2d 895, 906 (Mont. 1993); Boyd v. Comdata Network, Inc., 88 S.W.3d 203, 213 (Tenn. Ct. App. 2002).

24. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 (2000) [hereinafter RESTATEMENT].

25. OXY Resources Cal. LLC v. Superior Court, 9 Cal. Rptr. 3d 621, 644-45 (Cal. Ct. App. 2004); *Boyd*, 88 S.W.3d at 213.

26. State *ex rel.* Polytech, Inc. v. Voorhees, 895 S.W.2d 13, 14 (Mo. 1995).

27. Barton v. United States Dist. Court for the Cent. Dist. of Cal., 410 F.3d 1104, 1111 (9th Cir. 2005) (applying California law); State v. Fodor, 880 P.2d 662, 669 (Ariz. Ct. App. 1994); Popp v. O'Neil, 730 N.E.2d 506, 511 (Ill. App. Ct. 2000); Lovell v. Winchester, 941 S.W.2d 466, 467 (Ky. 1997); Gay v. Luihn Food Sys., Inc., No. CL00-121, 2001 WL 103883, at **3-4 (Va. Cir. Ct. Feb. 7, 2001).

28. Swidler & Berlin v. United States, 524 U.S. 399, 405 (1998); *see also In re* Miller, 584 S.E.2d 772, 779 (N.C. 2003) (collecting state court cases on this point).

29. Wesp v. Everson, 33 P.3d 191, 197 (Colo. 2001).

30. *Id.*

31. *Id.* at 198; *see also* Lewis v. UNUM Corp. Severance Plan, 203 F.R.D. 615, 618 (D. Kan. 2001) (discussing federal law); Pietro v. Marriott Senior Living Servs., Inc., 810 N.E.2d 217, 226 (Ill. App. Ct. 2004); St. Luke Hosps., Inc. v. Kopowski, 160 S.W.3d 771, 775 (Ky. 2005); *In re* E.I. DuPont de Nemours & Co., 136 S.W.3d 218, 223 (Tex. 2004); Via v. Commonwealth, 590 S.E.2d 583, 594 (Va. Ct. App. 2004) (quoting Commonwealth v. Edwards, 370 S.E.2d 296, 301 (Va. 1988)); State *ex rel.* Brison v. Kaufman, 584 S.E.2d 480, 488 (W. Va. 2003) (quoting syllabus point from earlier case); State v. Meeks, 666 N.W.2d 859, 865 (Wis. 2003).

32. Baptiste v. Cushman & Wakefield, Inc., No. 03Civ.2102(RCC)(THK), 2004 WL 330235, at **1-2 (S.D.N.Y. Feb. 20, 2004); Blumenthal v. Kimber Mfg. Co., 826 A.2d

A party seeking to protect a written or electronic communication from discovery does not have to identify it as "privileged" or "confidential" for the attorney-client privilege to attach.[34] On the other hand, a party cannot shield a communication from discovery simply by branding it "confidential" or "privileged."[35] The test for determining privilege is always whether a communication satisfies the elements necessary to establish the privilege, not how it is identified or labeled.

A corporation is entitled to assert the attorney-client privilege,[36] as is a partnership.[37] Organizations may claim the privilege with respect to communications with in-house counsel.[38] In the corporate context, the most common problem is determining who among the corporation's employees speaks on its behalf. Courts have traditionally applied two tests to analyze corporate privilege claims: the "control group" test and the "subject matter" test. A few courts have adopted a third test that closely tracks the subject matter test.[39]

Under the control group test, the communication must be made by an employee who is in a position "to control or take a substantial part in the determination of corporate action in response to legal advice" for the privilege to attach.[40] Only these employees qualify as the "client" for attorney-client privilege purposes.[41] Thus, the control group test essentially limits the application of the privilege to communications

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1088, 1096-1101 (Conn. 2003); City of Reno v. Reno Police Protective Ass'n, 59 P.3d 1212, 1218 (Nev. 2002).

33. *In re* Asia Global Crossing, Ltd., 322 B.R. 247, 256 (Bankr. S.D.N.Y. 2005).

34. *See Baptiste*, 2004 WL 330235, at **1-2 (rejecting argument that failure to label e-mail as privileged deprived it of privileged status); *Blumenthal*, 826 A.2d at 1098 (discussing e-mail and stating: "Whether a document expressly is marked as "confidential" is not dispositive, but is merely one factor a court may consider in determining confidentiality."); Chrysler Corp. v. Sheridan, No. 227511, 2001 WL 773099, at *3 (Mich. Ct. App. July 10, 2001) (involving the inadvertent disclosure of an e-mail that was not identified as "privileged" or "confidential").

35. *Blumenthal*, 826 A.2d at 1098; *cf.* Ledgin v. Blue Cross & Blue Shield of Kan. City, 166 F.R.D. 496, 499 (D. Kan. 1996) (describing a party's document stamp of "attorney work product" as a "self-serving embellishment" that did not preclude discovery).

36. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985).

37. *See, e.g.*, *In re* Bieter Co., 16 F.3d 929, 935 (8th Cir. 1994) (discussing the applicability of the attorney-client privilege in the partnership context).

38. *See, e.g.*, Premiere Digital Access, Inc. v. Cent. Tel. Co., 360 F. Supp. 2d 1168, 1174-75 (D. Nev. 2005) (finding that privilege applied to in-house lawyer's e-mail communications to others in his company under both Nevada and federal law); Fla. Marlins Baseball Club, LLC v. Certain Underwriters at Lloyd's London, 900 So. 2d 720, 721 (Fla. Dist. Ct. App. 2005) (finding that in-house lawyer was providing legal advice, not business advice, and thus upholding privilege claim).

39. *See In re Bieter Co.*, 16 F.3d at 935-36.

40. EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 100 (4th ed. 2001).

41. *Id.*

between a member of senior management and an attorney. The control group test has been severely criticized because (1) it has a chilling effect on corporate communications, (2) it frustrates the very purpose of the privilege by discouraging subordinate employees from communicating important information to corporate counsel, (3) it makes it difficult for corporate counsel to properly advise their clients and to ensure their clients' compliance with the law, and (4) it yields unpredictable results.[42] Nonetheless, a few jurisdictions still adhere to this test.[43]

Under the subject matter test, a communication with an employee of any rank may be privileged if (1) it is made for the purpose of securing legal advice for the corporation, (2) the employee is communicating at a superior's request or direction, and (3) the employee's responsibilities include the subject matter of the communication.[44] The subject matter test also includes a "need to know" element; that is, the communication must not be disseminated beyond those persons who, because of the corporate structure, need to know its contents.[45]

The third test is essentially indistinguishable from the subject matter test. This test is commonly referred to as the "modified *Harper & Row* test," or the "*Diversified Industries* test," after the cases from which it derives, *Harper & Row Publishers, Inc. v. Decker,*[46] and *Diversified Industries, Inc. v. Meredith.*[47] Under this test:

> The attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.[48]

The modified *Harper & Row* or *Diversified Industries* test was crafted as an alternative to the subject matter test in order to focus more on why the

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42. *See* Upjohn Co. v. United States, 449 U.S. 383, 391-93 (1981).

43. *See, e.g.*, Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 256-58 (Ill. 1982) (reasoning that control group test strikes a reasonable balance by protecting consultation with counsel by decision makers or those who substantially influence corporate decisions while minimizing amount of relevant factual information that is shielded from discovery).

44. EPSTEIN, *supra* note 40, at 100.

45. *See* S. Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1383 (Fla. 1994).

46. 423 F.2d 487 (7th Cir. 1970).

47. 572 F.2d 596 (8th Cir. 1977).

48. *In re Bieter Co.*, 16 F.3d 929, 936 (8th Cir. 1994) (quoting Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977)).

attorney was consulted, as well as to prevent the routine routing of information through counsel to prevent later disclosure.[49]

With respect to partnerships, it is generally the rule that all partners are considered the client in all attorney-client communications involving partnership affairs.[50] Employees of the partnership may serve as its agents for purposes of making privileged communications.[51] Whether an employee's communications with partnership counsel are in fact privileged is determined by any of the tests applied to corporations.[52]

Courts narrowly construe the attorney-client privilege because it limits full disclosure of the truth.[53] For example, the privilege ordinarily does not protect a client's identity,[54] as illustrated by recent cases in which courts compelled law firms to reveal the identities of clients who participated in aggressive tax avoidance strategies.[55] Similarly, the privilege does not shield the mere fact that an attorney-client relationship exists, the date of its commencement, the general nature of the services for which the attorney was retained, or the terms and conditions of the attorney's engagement.[56] While the privilege protects the content of an attorney-client communication from disclosure, it does not protect the

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49. *Deason*, 632 So. 2d at 1383 n.10.

50. 1 PAUL R. RICE ET AL., ATTORNEY CLIENT PRIVILEGE IN THE UNITED STATES § 4.49, at 266 (2d ed. 1999) (discussing general partnerships and distinguishing limited partnerships).

51. RESTATEMENT, *supra* note 24, at § 73 cmt. d.

52. *See In re Bieter Co.*, 16 F.3d at 935-40 (applying modified *Harper & Row* test in case involving a partnership).

53. PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., 838 A.2d 135, 167 (Conn. 2004); *In re* Bryan, 61 P.3d 641, 656 (Kan. 2003); E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc., 718 A.2d 1129, 1138 (Md. 1998); Whitehead v. Nev. Comm'n on Judicial Discipline, 873 P.2d 946, 968 (Nev. 1994); *In re* Grand Jury Subpoena Dated June 30, 2003, 770 N.Y.S.2d 568, 572 (N.Y. Sup. Ct. 2003); Callahan v. Nystedt, 641 A.2d 58, 61 (R.I. 1994); Lane v. Sharp Packaging Sys., Inc., 640 N.W.2d 788, 798 (Wis. 2002) (quoting cases).

54. United States v. BDO Seidman, 337 F.3d 802, 811 (7th Cir. 2003) (noting, however, that "the identity of a client may be privileged in the rare circumstance when so much of an actual confidential communication has been disclosed already that merely identifying the client will effectively disclose that communication"); United States v. Sindel, 53 F.3d 874, 876 (8th Cir. 1995) (noting three exceptions to this rule, all related to criminal consequences for the client); Tenet Healthcare Corp. v. La. Forum Corp., 538 S.E.2d 441, 444-45 (Ga. 2000) (noting two exceptions to this rule: (1) where identifying the client may expose the client to criminal liability for acts previously committed about which the client consulted the attorney; and (2) where disclosure of the client's identity would reveal the substance of confidential attorney-client communications).

55. *See, e.g.*, United States v. Jenkens & Gilchrist, P.C., No. 03 5693, 2004 WL 870824, at *1 (N.D. Ill. Apr. 20, 2004) (Moran, J.); United States v. Sidley Austin Brown & Wood LLP, No. 03 C 9355, 2004 WL 816448, at *7 (N.D. Ill. Apr. 15, 2004) (Kennelly, J.).

56. *See, e.g.*, Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 603 (8th Cir. 1977) (rejecting privilege claim related to law firm memorandum).

facts communicated from disclosure.[57] Nor does the privilege shield from discovery communications generated or received by an attorney acting in some other capacity, or communications in which an attorney is giving business advice rather than legal advice.[58]

The attorney-client privilege is not absolute,[59] and it may be waived either voluntarily or by implication.[60] The burden of establishing a waiver generally is borne by the party seeking to overcome the privilege,[61] although some courts hold that that the party asserting the privilege bears the burden of establishing that it has not been waived.[62] The most difficult cases, of course, are those involving implied waivers; case law affords little guidance for courts or lawyers in terms of how broadly implied waivers sweep.[63]

B. The Work Product Doctrine

"The attorney-client privilege and the work product doctrine are separate and distinct."[64] Unlike the attorney-client privilege, which is the client's to assert, it is commonly said that the lawyer holds work product immunity.[65] In fact, both the lawyer and the client hold work product immunity, and either may assert it to avoid discovery.[66] Similarly, either the client or the lawyer may waive work product immunity, although only with respect to himself.[67]

The protection afforded by work product immunity is broader than that conferred by the attorney-client privilege.[68] Work product immunity

57. Mackey v. IBP, Inc., 167 F.R.D. 186, 200 (D. Kan. 1996).

58. 1 RICE ET AL., *supra* note 50, § 7.1, at 7, 11.

59. Genova v. Longs Peak Emergency Physicians, P.C., 72 P.3d 454, 462 (Colo. Ct. App. 2003); Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co., 623 A.2d 1118, 1121-22 (Del. 1994); Newman v. State, 863 A.2d 321, 331 (Md. 2004); Ross v. Med. Univ. of S.C., 453 S.E.2d 880, 884-85 (S.C. 1994); State v. Aquino-Cervantes, 945 P.2d 767, 771 (Wash. Ct. App. 1997).

60. United States v. Mass. Inst. of Tech., 129 F.3d 681, 684 (1st Cir. 1997).

61. Wesp v. Everson, 33 P.3d 191, 198 (Colo. 2001); State *ex rel.* Med. Assurance of W. Va., Inc. v. Recht, 583 S.E.2d 80, 89 (W. Va. 2003).

62. *See, e.g.*, *In re* Asia Global Crossing, Ltd., 322 B.R. 247, 255 (Bankr. S.D.N.Y. 2005); Lewis v. UNUM Corp. Severance Plan, 203 F.R.D. 615, 621 (D. Kan. 2001); Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc., 35 F. Supp. 2d 582, 590 (N.D. Ohio 1999).

63. *In re* Keeper of the Records, 348 F.3d 16, 22-23 (1st Cir. 2003).

64. Elkton Care Ctr. Assocs. Ltd. P'ship v. Quality Care Mgmt., Inc., 805 A.2d 1177, 1183 (Md. Ct. Spec. App. 2002).

65. OXY Res. Cal. LLC v. Superior Court, 9 Cal. Rptr. 3d 621, 645 (Cal. Ct. App. 2004); Clausen v. Nat'l Grange Mut. Ins. Co., 730 A.2d 133, 138 (Del. Super. Ct. 1997).

66. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 924 n.15 (8th Cir. 1997).

67. *In re* Grand Jury Proceedings, 43 F.3d 966, 972 (5th Cir. 1994).

68. *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 304 (6th Cir. 2002) (quoting *In* re Antitrust Grand Jury, 805 F.2d 155, 163 (6th Cir.

is not limited, as is the attorney-client privilege, to confidential communications between an attorney and a client. The work product doctrine protects lawyers' effective trial preparation by immunizing certain information and materials from discovery, including materials prepared by attorneys' agents and consultants.[69] The doctrine is rooted in the desire to foreclose unwarranted inquiries into attorneys' files and mental impressions in the guise of liberal discovery.[70]

There are two categories or types of attorney work product: "fact" or "ordinary" work product—better described as "tangible" work product—and "opinion" or "core" work product—sometimes termed "intangible" work product. To qualify as tangible work product, the material sought to be protected must be a document or tangible thing prepared by or for a party, or by or for the party's representative, in anticipation of litigation.[71] Opinion work product refers to an attorney's conclusions, legal theories, mental impressions, or opinions.[72]

The work product doctrine is codified in Federal Rule of Civil Procedure 26(b)(3) and its state counterparts. Rule 26(b)(3) provides, in pertinent part:

> Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.[73]

As with the attorney-client privilege, work product protection is not absolute.[74] As Rule 26(b)(3) makes clear, a party may discover its

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1986)); Frank W. Schaefer, Inc. v. C. Garfield Mitchell Agency, Inc., 612 N.E.2d 442, 446-47 (Ohio Ct. App. 1992).

69. *In re* Cendant Corp. Sec. Litig., 343 F.3d 658, 662 (3d Cir. 2003) (protecting communications with party's trial strategy and deposition preparation consultant).

70. *See* Hickman v. Taylor, 329 U.S. 495, 510 (1947).

71. FED R. CIV. P. 26(b)(3).

72. State *ex rel.* Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley, 898 S.W.2d 550, 552 (Mo. 1995); *see also* EPSTEIN, *supra* note 40, at 568.

73. FED. R. CIV. P. 26(b)(3).

74. *In re* Cendant Corp. Sec. Litig., 343 F.3d 658, 663 (3d Cir. 2003).

adversary's tangible work product if it demonstrates substantial need of the materials to prepare its case, and it is unable without undue hardship to obtain the substantial equivalent of the materials by other means.[75] The discovering party must specifically explain its need for the materials sought.[76] Whether immunity for tangible work product will be abrogated in a given case typically depends on available alternative sources of the information sought, the parties' relative resources, and the need to protect the target party's expectation of confidentiality.[77]

Opinion work product, on the other hand, receives almost absolute protection against discovery.[78] To discover an adversary's opinion work product, a party must demonstrate something far greater than the substantial need and undue hardship necessary to obtain tangible work product.[79] Opinion work product is discoverable only if the attorneys' conclusions, mental impressions or opinions are at issue in the case, and there is a compelling need for their discovery.[80] The circumstances in which these requirements are met are exceptionally rare.[81] Additionally, a court that allows the discovery of a lawyer's tangible work product must be careful to ensure that allowing its discovery does not expose the lawyer's opinion work product to discovery.[82] There is, for example, a significant difference between a witness's statement and an attorney's notes concerning that statement, the latter being strictly protected opinion work product because the notes may contain the attorney's mental impressions or reflect her case theories.[83]

In contrast to the attorney-client privilege, which is not limited to communications about litigation,[84] information must be generated or prepared "in anticipation of litigation" to qualify as work product.[85]

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75. In contrast, communications protected by the attorney-client privilege do not become discoverable by virtue of the fact that the party seeking them is unable to obtain the information from other sources. St. Luke Hosps., Inc. v. Kopowski, 160 S.W.3d 771, 776-77 (Ky. 2005).

76. EPSTEIN, *supra* note 40, at 550.

77. *Id.* at 567.

78. *In re Cendant Corp.*, 343 F.3d at 663 (quoting *In re* Ford Motor Co., 110 F.3d 954, 962 n.7 (3d Cir. 1997)).

79. *In re* Grand Jury Subpoenas, 265 F. Supp. 2d 321, 333 (S.D.N.Y. 2003).

80. *See* Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573, 577 (9th Cir. 1992).

81. *In re Cendant Corp.*, 343 F.3d at 663.

82. State *ex rel.* Ford Motor Co. v. Westbrooke, 151 S.W.3d 364, 367 (Mo. 2004) (quoting MO. SUP. CT. R. 56.01(b)(3)); LaPorta v. Gloucester County Bd. of Chosen Freeholders, 774 A.2d 545, 548 (N.J. Super. Ct. App. Div. 2001) (quoting Hickman v. Taylor, 329 U.S. 495 (1947)).

83. Giannicos v. Bellevue Hosp. Med. Ctr., 793 N.Y.S.2d 893, 896 (N.Y. Sup. Ct. 2005).

84. *In re* Tex. Farmers Ins. Exch., 990 S.W.2d 337, 340 (Tex. App. 1999).

85. Save Sunset Beach Coalition v. City of Honolulu, 78 P.3d 1, 20 (Haw. 2003);

Documents prepared in the ordinary course of business, or that would have been prepared regardless of whether litigation was anticipated, are not entitled to work product immunity.[86] It is "not necessary that litigation be threatened or imminent, as long as the prospect of litigation is identifiable because of claims that have already arisen."[87] Some courts state the "anticipation of litigation" requirement a bit differently, holding that work product immunity attaches only if there is "a substantial probability that litigation will ensue."[88]

Of course, it may be that materials claimed to be work product were prepared for more than one purpose. In this situation, some jurisdictions require a court to discern "the primary motivating purpose" behind the documents' creation.[89] "If the primary motivating purpose is other than to assist in pending or impending litigation," then the materials are not protected as work product.[90] Other jurisdictions have abandoned the primary motivating purpose test for a "because of" test.[91] Applying this test, "the work product doctrine can reach documents prepared 'because of litigation' even if they were prepared in connection with a business transaction or also served a business purpose."[92]

Whether one test is better than the other arguably depends on the parties' perspectives in any given case. The "because of" test affords broader protection against discovery; therefore, it is more consistent with and supportive of the purposes underlying work product immunity. To the extent courts have the ability to select between the two approaches, the "because of" test represents the better alternative.

Finally, work product immunity extends to subsequent litigation.[93]

Wichita Eagle & Beacon Pub. Co. v. Simmons, 50 P.3d 66, 85 (Kan. 2002); Miller v. J.B. Hunt Transp., Inc., 770 A.2d 1288, 1291-93 (N.J. Super. Ct. App. Div. 2001); State *ex rel.* Brandenburg v. Blackmer, 110 P.3d 66, 69 (N.M. 2005). *But see* Laguna Beach County Water Dist. v. Superior Court, 22 Cal. Rptr. 3d 387, 393 (Cal. Ct. App. 2004) (explaining that California law imposes no "anticipation of litigation" requirement).

86. *In re* Copper Mkt. Antitrust Litig., 200 F.R.D. 213, 221 (S.D.N.Y. 2001).

87. Nat'l Tank Co. v. 30th Judicial Dist. Court, 851 S.W.2d 193, 205 (Tex. 1993).

88. *Wichita Eagle & Beacon*, 50 P.3d at 85.

89. *In re* Pfizer Inc. Sec. Litig., No. 90 Civ. 1260 (SS), 1993 WL 561125, at *3 (S.D.N.Y. Dec. 23, 1993) (quoting cases); *Ex Parte* Cryer, 814 So. 2d 239, 247 (Ala. 2001) (quoting cases); Heffron v. Dist. Court of Okla. County, 77 P.3d 1069, 1079 (Okla. 2003); Arnold v. City of Chattanooga, 19 S.W.3d 779, 784 (Tenn. Ct. App. 1999).

90. *In re Pfizer Inc. Sec. Litig.*, 1993 WL 561125, at *3.

91. *See, e.g.*, *In re* Sealed Case, 146 F.3d 881, 884 (D.C. Cir. 1998); United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998); Logan v. Commercial Union Ins. Co., 96 F.3d 971, 976-77 (7th Cir. 1996); Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252, 1258 (3d Cir. 1993); Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992); United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065, 1082 (N.D. Cal. 2002); Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc., 690 N.W.2d 38, 48 (Iowa 2004).

92. *Chevron Texaco*, 241 F. Supp. 2d at 1082.

93. Frontier Ref., Inc. v. Gorman-Rupp Co., 136 F.3d 695, 703 (10th Cir. 1998);

If information was created in anticipation of litigation with respect to Case *A* and otherwise meets all of the work product criteria, it remains immune from discovery in Case *B*. Although there is some debate about whether the subsequent litigation must be closely related to the original litigation for work product immunity to attach in the second case, courts have generally avoided drawing this distinction, and those courts that have addressed the issue have not required a close relationship between the cases.[94]

C. Lawyers' Ethical Duty of Confidentiality

"It is axiomatic that among the highest duties an attorney owes a client is the duty to maintain the confidentiality of client information."[95] Lawyers' duty to maintain client confidences is a fundamental agency law principle.[96] The duty is further found in ethics rules. For example, Model Rule of Professional Conduct 1.6(a) states that a lawyer "shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is authorized to carry out the representation or the disclosure is permitted by [Rule 1.6(b)]."[97] In states still adhering to the Model Code of Professional Responsibility, lawyers' duty of confidentiality is enforced by way of DR 4-101(B)(1), which provides, with few exceptions, that a lawyer "shall not knowingly . . . reveal a confidence or secret of his client."[98] For DR 4-101 purposes, a "confidence" refers to information protected under the attorney-client privilege, while a secret refers to other information acquired in the relationship "that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client,"[99] although some courts define or interpret these terms differently. For example, the Ohio Supreme Court has opined that "a 'confidence' is information learned directly from the client, whereas a 'secret' is defined more broadly."[100] In Ohio, a client "secret" includes not only "embarrassing or detrimental information that the client reveals," but also detrimental or embarrassing information

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Maldonado v. State *ex rel.* Admin. Office of Courts—Prob. Div., 225 F.R.D. 120, 131 (D.N.J. 2004).

94. *See Frontier Ref., Inc.*, 136 F.3d at 703 (citing cases).

95. Commonwealth v. Downey, 793 N.E.2d 377, 381 (Mass. App. Ct. 2003).

96. LAWRENCE J. FOX & SUSAN R. MARTYN, RED FLAGS: A LAWYER'S HANDBOOK ON LEGAL ETHICS 87 (2005).

97. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2004) [hereinafter MODEL RULES].

98. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(B)(1) (1969) (footnote omitted) [hereinafter MODEL CODE].

99. *Id.* DR 4-101(A).

100. Akron Bar Ass'n v. Holder, 810 N.E.2d 426, 434 (Ohio 2004).

about the client "available from other sources."[101]

Rule 1.6(a) and DR 4-101 are intended to encourage clients to trust their attorneys and to be candid with them.[102] Lawyers' duty of confidentiality, although not absolute,[103] is very broad.[104] Any exceptions the rules provide are narrow.[105] Lawyers' duty of confidentiality attaches to initial consultations and preliminary communications, even if no attorney-client relationship ultimately results,[106] and continues after representation concludes.[107]

Rule 1.6 and DR 4-101 prevent the disclosure of information that is neither privileged nor work product.[108] "Confidential" is not synonymous with "privileged" or "immune."[109] Thus, a lawyer's duty of confidentiality prevents her from revealing a client's identity or facts that a client communicates to her, even though the attorney-client privilege and work product immunity do not protect them.[110] Moreover, lawyers are bound by their duty of confidentiality at all times, not just when they face inquiry from others.[111]

Lawyers' duty of confidentiality is especially broad in the many jurisdictions that have enacted versions of Model Rule 1.6(a). In these jurisdictions a lawyer's duty of confidentiality attaches "not merely to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source."[112]

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101. *Id.*

102. *In re* Disciplinary Proceeding Against Schafer, 66 P.3d 1036, 1041 (Wash. 2003).

103. Commonwealth v. Downey, 793 N.E.2d 377, 382 (Mass. App. Ct. 2003).

104. *In re* Bryan, 61 P.3d 641, 656 (Kan. 2003).

105. *Id.* (discussing Kansas' version of Rule 1.6).

106. Gay v. Luihn Food Sys., Inc., No. CL00-121, 2001 WL 103883, at *4 (Va. Cir. Ct. Feb. 7, 2001) (citing and quoting Virginia ethics opinions).

107. Cont'l Res., Inc. v. Schmalenberger, 656 N.W.2d 730, 735 (N.D. 2003); Kala v. Aluminum Smelting & Ref. Co., 688 N.E.2d 258, 262 (Ohio 1998).

108. *See In re* Gonzalez, 773 A.2d 1026, 1031 (D.C. 2001) ("An attorney's duty of confidentiality applies not only to privileged 'confidences,' but also to unprivileged secrets; it 'exists without regard to the nature or source of the information or the fact that others share the knowledge.'" (quoting Perillo v. Johnson, 205 F.3d 775, 800 n.9 (5th Cir. 2000))); Tenet Healthcare Corp. v. La. Forum Corp., 538 S.E.2d 441, 445 (Ga. 2000) ("An attorney's ethical . . . duty to maintain client secrets is distinguishable from the attorney-client privilege.").

109. *See* Doe v. Md. Bd. of Soc. Workers, 840 A.2d 744, 749 (Md. Ct. Spec. App. 2004) (explaining that information "can be confidential and, at the same time, non-privileged," and that "privilege" is the legal protection given to certain communications and relationships, while "confidential" describes a type of communication or relationship).

110. *See* FOX & MARTYN, *supra* note 96, at 93.

111. Newman v. State, 863 A.2d 321, 332 (Md. 2004); Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 860 (W. Va. 1995).

112. State *ex rel.* Okla. Bar Ass'n v. McGee, 48 P.3d 787, 791 (Okla. 2002); *see also* State v. Meeks, 666 N.W.2d 859, 868 (Wis. 2003) (same).

Lawyers may breach their duty of confidentiality under Rule 1.6(a) by revealing information that is available from sources other than their clients, including public information.[113] In Model Code states, lawyers are prohibited from revealing public information about a client only if it constitutes a client secret, that is, the information is detrimental or embarrassing to the client.[114]

III. Communications with Public Relations Consultants

As numerous recent cases illustrate, parties in high profile civil and criminal matters often find their cases being tried in the media. Businesses accused of serious misconduct are especially threatened by negative media attention. Not surprisingly, litigants and targets of government inquiries often turn to public relations consultants for assistance.[115]

When public relations professionals assist parties in litigation, it is foreseeable that they will interact with the lawyers representing those parties, review documents prepared by or for counsel, and participate in meetings attended by counsel in which legal issues or strategies are discussed. It is also foreseeable that these activities may expose otherwise confidential communications to discovery. For example, the presence of a public relations consultant at a meeting between a senior executive of a corporation under government investigation and defense counsel may open that meeting to discovery because, in general, the presence of a third party to a communication robs it of the confidentiality that the attorney-client privilege is intended to ensure.[116] On the other hand, the presence of a third party does not waive the privilege if the third party is there "to facilitate the effective rendition of legal services."[117] Thus, when it comes to the presence of public relations

113. *See, e.g.*, *In re* Anonymous, 654 N.E.2d 1128, 1129-30 (Ind. 1995) (holding that lawyer violated Rule 1.6(a) by revealing information "readily available from public sources"); *McGraw*, 461 S.E.2d at 861-62 ("The ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it.").

114. Akron Bar Ass'n v. Holder, 810 N.E.2d 426, 435 (Ohio 2004) (stating that under DR 4-101, "an attorney is not free to disclose embarrassing or harmful features of a client's life just because they are documented in public records").

115. *See generally In re* Grand Jury Subpoenas, 265 F. Supp. 2d 321, 330 (S.D.N.Y. 2003) ("[D]ealing with the media in a high profile case probably is not a matter for amateurs.").

116. *See* Oxyn Telecomms., Inc. v. Onse Telecom, No. 01 Civ. 1012(JSM), 2003 WL 660848, at *2 (S.D.N.Y. Feb. 27, 2003); Lewis v. UNUM Corp. Severance Plan, 203 F.R.D. 615, 620 (D. Kan. 2001); Newman v. State, 863 A.2d 321, 333 (Md. 2004).

117. *Oxyn Telecomms.*, 2003 WL 660848, at *2; *see also Newman*, 863 A.2d at 334-35 (finding no waiver where client's friend attended meeting at attorney's behest to lessen client's stress and to otherwise aid the attorney's representation of the client).

consultants at meetings with counsel, privilege law is at best unclear.

Courts routinely hold that communications with public relations consultants are not privileged.[118] For example, in *Calvin Klein Trademark Trust v. Wachner*,[119] the law firm of Boies, Schiller & Flexner ("Boies") hired a public relations firm, RLM, to provide communications consulting in connection with Boies' representation of Calvin Klein, Inc. ("CKI"). When the defendants sought to discover various documents from RLM and to depose an RLM employee, CKI refused on privilege and work product grounds.[120]

The court concluded that none of the subject documents were privileged for at least three reasons. First, the attorney-client privilege protects communications between a client and its attorney, not communications that are important to the attorney's legal advice to the client.[121] The documents given to RLM did not contain or reveal confidential communications from CKI for the purpose of obtaining legal advice. The possibility that communications between Boies and RLM might help Boies formulate legal advice was not sufficient to trigger the privilege.

Second, even if any of the documents contained privileged communications, their disclosure to RLM waived the privilege.[122] Rather than serving as a translator, for example, RLM was simply dispensing public relations advice. RLM's service to Boies consisted of reviewing press coverage, calling members of the media to comment on the litigation, and locating reporters who might treat CKI favorably.[123] As the court explained:

> The possibility that such activity may also have been helpful to [Boies] in formulating legal strategy is neither here nor there if RLM's work and advice simply serves to assist counsel in assessing the probable public reaction to various strategic alternatives, as opposed to enabling counsel to understand aspects of the client's own communications that could not otherwise be appreciated in the rendering of legal advice.[124]

Third, there was no evidence that RLM was performing any

118. *See, e.g.*, Haugh v. Schroder Inv. Mgmt. N. Am., Inc., No. 02 Civ. 7955 DLC, 2003 WL 21998674 (S.D.N.Y. Aug. 25, 2003); Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 55 (S.D.N.Y. 2000); Blumenthal v. Drudge, 186 F.R.D. 236, 242-43 (D.D.C. 1999).

119. 198 F.R.D. 53 (S.D.N.Y. 2000).

120. *Id.* at 54.

121. *Id.* (quoting United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999)).

122. *Id.*

123. *Id.* at 54-55.

124. *Id.* at 55.

functions that were materially different from those that any ordinary public relations firm would have performed had it been hired by CKI instead of Boies.[125] Indeed, when Boies came along, RLM was already consulting with CKI pursuant to a contract entered into some eight months earlier.[126] "It may be," the court observed, "that the modern client comes to court as prepared to massage the media as to persuade the judge[,] but nothing in the client's communications for the former purpose constitutes the obtaining of legal advice or justifies a privileged status."[127]

As for CKI's work product argument, the court observed that most public relations advice is not protected because the work product doctrine is intended to protect litigation strategy, not strategy related to the effects of the litigation on the client's customers, the media, or the public.[128] Even so, work product immunity is not waived simply because an attorney provides her work product to a public relations consultant who the attorney hires and who keeps confidential the work product she is provided. This is especially so if the public relations consultant needs to know the attorney's strategy to provide public relations advice and, in turn, the public relations advice bears on the attorney's own litigation strategy or tactics.[129] The *Calvin Klein* court determined that several categories of documents retained their work product immunity even though they had been given to RLM. The court ordered CKI to produce all other documents and to produce the RLM employee for deposition.[130]

Calvin Klein does not necessarily reflect the majority rule; other courts have found that communications with public relations consultants are privileged.[131] In *H.W. Carter & Sons, Inc. v. Wiiliam Carter Co.,*[132] for example, the court held that the presence of a public relations consultant at a meeting between the defendant and its counsel did not waive the attorney-client privilege because the consultant "participated to assist the lawyers in rendering legal advice, which included how [the] defendant should respond to [the] plaintiff's lawsuit."[133] The court in *In*

125. *Id.*
126. *Id.* at 54.
127. *Id.* at 55 (footnote omitted).
128. *Id.*
129. *Id.*
130. *Id.* at 56.
131. *See, e.g., In re* Grand Jury Subpoenas, 265 F. Supp. 2d 321, 326-32 (S.D.N.Y. 2003); Fed. Trade Comm'n v. Glaxosmithkline, 294 F.3d 141, 148 (D.C. Cir. 2002); *In re* Copper Mkt. Antitrust Litig., 200 F.R.D. 213, 215-20 (S.D.N.Y. 2001); H.W. Carter & Sons, Inc. v. William Carter Co., No. 95 Civ. 1274 (DC), 1995 WL 301351, at *3 (S.D.N.Y. May 16, 1995); *In re* Monsanto Co., 998 S.W.2d 917, 932 (Tex. App. 1999).
132. No. 95 Civ. 1274 (DC), 1995 WL 301351 (S.D.N.Y. May 16, 1995).
133. *Id.* at *3.

re Grand Jury Subpoenas[134] held that:

> (1) confidential communications (2) between lawyers and public relations consultants (3) hired by the lawyers to assist them in dealing with the media in cases such as this [high profile grand jury investigation into Martha Stewart's alleged insider trading] (4) that are made for the purpose of giving or receiving advice (5) directed at handling the client's legal problems are protected by the attorney-client privilege.[135]

Based upon existing case law, it is exceptionally difficult to predict when communications with public relations consultants are privileged. Courts extend the attorney-client privilege to non-lawyers very rarely, and even then confine it to its narrowest possible limits.[136] As a result, only three general statements can safely be made. First, the privilege is more likely to attach where the lawyer hires the public relations consultant;[137] conversely, the likelihood of the privilege applying is diminished where the client hires the public relations consultant.[138] Second, for the privilege to apply, there must be a clear nexus between the public relations consultant's work and the attorney's role in representing the client.[139] In other words, the client must show that communications with a public relations consultant were made so that the client could obtain legal advice from his attorney.[140] If the public relations consultant was retained for the value of her own advice, the privilege will not attach.[141] Third, the privilege is more likely to attach where a client does not have in-house public relations capabilities, or the client is a foreign corporation unfamiliar with the United States legal system, such that the public relations consultant can be fairly equated with the client for the purpose of privilege analysis.[142]

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134. 265 F. Supp. 2d 321 (S.D.N.Y. 2003).

135. *Id.* at 331.

136. *See* Blumenthal v. Drudge, 186 F.R.D. 236, 243 (D.D.C. 1999) (quoting Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508, 1514 (D.C. Cir. 1993)).

137. *See In re* Grand Jury Subpoenas, 265 F. Supp. 2d 321, 331 (S.D.N.Y. 2003).

138. *See, e.g.*, Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 54-55 (S.D.N.Y. 2000) (involving public relations consultant working for client when hired by law firm).

139. *See* Haugh v. Schroder Inv. Mgmt. N. Am., Inc., No. 02 Civ. 7955 DLC, 2003 WL 21998674, at *3 (S.D.N.Y. Aug. 25, 2003).

140. *Id.*

141. Blumenthal v. Drudge, 186 F.R.D. 236, 243 (D.D.C. 1999).

142. *See, e.g.*, Fed. Trade Comm'n v. GlaxoSmithKline, 294 F.3d 141, 148 (D.C. Cir. 2002) (involving public relations consultants who "acted as part of a team with full-time employees" of the defendant); *In re* Copper Mkt. Antitrust Litig., 200 F.R.D. 213, 217-220 (S.D.N.Y. 2001) (involving a Japanese corporation and public relations consultant that was essentially incorporated into the corporation's staff to perform a corporate

Because this area of privilege law is uncertain, lawyers who engage public relations consultants to aid their clients, or who must work with public relations consultants employed by media savvy clients, should assume that their communications with those consultants, as well as their clients' communications with the consultants, will not be privileged. As a result, any important communications with public relations professionals should be verbal rather than written, or embodied in e-mails. This reduces the risk that confidential communications will be discovered. The only documents that should be given to public relations consultants are those that are public records—pleadings, annual reports, and documents filed with regulatory bodies—and those that the lawyer expects to be discovered in litigation.

Work product law in the area of public relations consultants is much more settled.[143] Even courts that have declined to extend the attorney-client privilege to communications with public relations consultants have denied discovery based on the work product doctrine.[144] For work product immunity to attach to communications with a public relations consultant (1) the communications must be made in anticipation of litigation, (2) the consultant must keep the communications confidential, and (3) the public relations strategy must bear on the attorney's own litigation strategy.[145]

IV. Communications with Auditors

The Securities and Exchange Commission requires public companies to file an annual form 10-K, which includes a financial statement certified by an accountant functioning as an independent auditor.[146] In auditing a company's financial statements, an auditor must determine whether the company's financial statements, viewed as a whole, fairly represent its financial condition and performance in accordance with generally accepted accounting principles.[147] Among the factors that an auditor considers are whether the company has adequate reserves for claims against it, and whether there are material claims known to the company that are as yet unasserted.[148] Because auditors

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function).

143. *See* Bernstein & Harvey, *supra* note 13, at 1257 ("Greater consensus exists with respect to the work product doctrine.").

144. *See, e.g.*, *Haugh*, 2003 WL 219984, at **4-5; Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 55-56 (S.D.N.Y. 2000).

145. *See Calvin Klein*, 198 F.R.D. at 54-55.

146. John K. Villa, *Audit Letter Responses in the Wake of Sarbanes-Oxley*, ACC DOCKET, Oct. 2003, at 164, 165 (on file with the author).

147. Kenneth B. Winer & Scott Seabolt, *Responding to Audit Inquiries in a Time of Heightened Peril*, 36 SEC. REG. & LAW REP. BNA 1902, 1903 (2004).

148. Villa, *supra* note 146, at 165.

ordinarily lack the ability to make legal judgments, they attempt to gather information about claims by having the company write its regular outside counsel and ask counsel to write an audit response letter describing and evaluating claims that they are handling or are expecting to be asserted.[149] Lawyers' responses to auditors' inquiries have come to be known as "audit response letters" or "FASB 5 letters,"[150] the former term typically used by lawyers and the latter term employed by accountants. In some cases, accountants learn of matters that a company's lawyers are handling outside of the audit letter process.[151] Regardless, lawyers must always be concerned that communications with clients' independent auditors may waive the attorney-client privilege or work product immunity.

Lawyers answer auditors' inquiries in standard audit letter responses adhering to the so-called "treaty" between the ABA and the American Institute of Certified Public Accountants.[152] Absent unusual circumstances, conformity with the treaty's requirements means that lawyers' audit response letters do not waive the attorney-client privilege or work product immunity.[153] Whether this principle remains true after passage of the Sarbanes-Oxley Act of 2002[154] is a hot topic in professional liability circles and is beyond the scope of this article;[155] nevertheless, the effect that lawyers' communications with clients' accountants may have on the attorney-client privilege and work product immunity is a critical current issue.[156]

As a rule, the disclosure of privileged information to a client's outside auditor waives the attorney-client privilege.[157] This is because

149. Winer & Seabolt, *supra* note 147, at 1903.

150. Villa, *supra* note 146, at 165.

151. *See, e.g.*, Merrill Lynch & Co. v. Allegheny Energy, Inc., No. 02 Civ. 7689(HB), 2004 WL 2389822, at *2 (S.D.N.Y. Oct. 26, 2004) (describing communications between outside auditor and company's director of internal audit that led to attorneys' work product being given to outside auditor).

152. Am. Bar Ass'n, *Statement of Policy Regarding Lawyers' Responses to Auditor's Requests for Information*, 31 BUS. LAW. 1709 (1976).

153. Villa, *supra* note 146, at 166.

154. Pub. L. No. 107-204, 116 Stat. 745 (2002).

155. For practical discussions of this issue, see Villa, *supra* note 146; Winer & Seabolt, *supra* note 147.

156. LATHAM & WATKINS LLP, THE AUDITOR'S NEED FOR ITS CLIENT'S DETAILED INFORMATION VS. THE CLIENT'S NEED TO PRESERVE THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION: THE DEBATE, THE PROBLEMS, AND PROPOSED SOLUTIONS 1-3 (Corp. Couns. Consortium 2004) [hereinafter THE AUDITOR'S NEED] (on file with the author).

157. Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162 (9th Cir. 1992); Ferko v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 218 F.R.D. 125, 134 (E.D. Tex. 2003); *In re* Pfizer Inc. Sec. Litig., No. 90 Civ. 1260 (SS), 1993 WL 561125, at *7 (S.D.N.Y. Dec. 23, 1993); Chinn v. Endocare, Inc., No. Civ.A. 20262, 2003 WL 21517869, at *1 (Del. Ch. Ct. July 1, 2003).

the disclosure of information to a client's outside accountant "destroys the confidentiality seal required of communications protected by the attorney-client privilege, notwithstanding that the federal securities laws require an independent audit."[158] Indeed, it is generally the case that disclosure of confidential communications to a third party waives the attorney-client privilege, and there is no obvious reason to abrogate this rule in the context of attorneys' communications with clients' outside auditors.[159]

Assuming that the attorney-client privilege does not attach to lawyers' communications with clients' outside auditors, what about the effect of these communications on the work product doctrine?[160] Disclosures to third parties do not automatically waive work product immunity.[161] Courts are split on this issue.[162] *Medinol, Ltd. v. Boston Scientific Corp.*[163] and *Merrill Lynch & Co. v. Allegheny Energy, Inc.*,[164] are representative cases on opposite sides of the waiver issue decided by different courts in the same federal judicial district.

In *Medinol,* the plaintiff, Medinol, sued Boston Scientific in a license dispute. That dispute led Boston Scientific to terminate the employment of a number of executives, to engage counsel to conduct an internal investigation, and to report the investigation and its results to a special litigation committee of its board of directors.[165] Minutes of meetings of that committee were shown to Boston Scientific's outside public accountants, Ernst & Young, in connection with their audit of the company's financial statement.[166] Medinol sought to discover the minutes shown to Ernst & Young, and Boston Scientific resisted on work product grounds. In resolving the dispute in Medinol's favor, the court began by observing:

158. *In re Pfizer Inc. Sec. Litig.*, 1993 WL 561125, at *7.

159. *See* EPSTEIN, *supra* note 40, at 185 (noting that sharing communications with "third parties who are not agents of the attorney for purposes of assisting the attorney in giving legal advice negates the requisite element that confidentiality attend the making of the communication for the privilege to attach").

160. *See Ferko*, 218 F.R.D. at 136 ("Courts ordinarily apply the work-product doctrine only after deciding that the attorney-client privilege does not apply.").

161. *In re* Grand Jury Subpoena, 220 F.3d 406, 409 (5th Cir. 2000); *see, e.g.,* Gutter v. E.I. DuPont de Nemours & Co., No. 95-CV-2152, 1998 WL 2017926, at *5 (S.D. Fla. May 18, 1998) (finding that work product immunity attached to lawyers' letters to client's outside auditors).

162. *See* Laguna Beach County Water Dist. v. Superior Court, 22 Cal. Rptr. 3d 387, 392 (Cal. Ct. App. 2004) (noting that federal courts are split on this issue before holding that disclosure to auditor does not waive work product immunity).

163. 214 F.R.D. 113 (S.D.N.Y. 2002).

164. No. 02 Civ. 7689(HB), 2004 WL 2389822 (S.D.N.Y. Oct. 26, 2004).

165. *Medinol*, 214 F.R.D. at 114.

166. *Id.*

> While in some cases disclosure to accountants does not waive the protections of the work product doctrine, there is a difference between disclosure to accountants who have been retained by a lawyer to understand technical aspects of a case and whose interests are therefore allied with the client, and outside auditors who, in order to be effective, must have interests that are independent of and not always aligned with those of the company.[167]

The *Medinol* court acknowledged that work product immunity is not waived where a party shares confidential information with a third party who is aligned in interest or who shares common litigation objectives.[168] On the other side of that coin, sharing confidential information with a party whose interests are *not* aligned or who does *not* have common litigation objectives is a waiver.[169] The issue, then, was how to classify Ernst & Young. The court placed the accounting firm in the second camp, reasoning:

> Customarily, [m]anagement asks counsel who represent it in its lawsuits to make the relevant disclosures to the auditor and express opinions about exposures and probable outcomes. . . . The independent auditor, however, must come to his own understanding of reasonableness, based on the evidence. The auditor's review supports the auditor's independent opinion about the fairness of the company's financial reports, not the audited company's litigation interests. Thus, the auditor's interests are not necessarily aligned with the interests of the company. And, as has become crystal clear in the face of the many accounting scandals that have arisen as of late, in order for auditors to properly do their job, they *must* not share common interests with the company they audit.[170]

Ernst & Young reviewed the minutes of the meetings of Boston Scientific's special litigation committee in its role as the company's auditor. Accordingly, Ernst & Young's interests were not aligned with Boston Scientific's interests.[171] Although sharing the minutes with the accountants did not significantly increase the risk that they would come into adversaries' hands, it did not serve any litigation purpose, nor did it serve a policy reason supporting work product immunity.[172] Thus, the *Medinol* court concluded, the minutes were not protected by the work product doctrine, and the plaintiff was entitled to discover them.[173]

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167. *Id.*
168. *Id.* at 115.
169. *Id.*
170. *Id.* at 115-16 (footnote omitted).
171. *Id.* at 116.
172. *Id.*
173. *Id.* at 117.

The court in *Merrill Lynch & Co. v. Allegheny Energy, Inc.*,[174] reached a different conclusion. In that case, Merrill Lynch investigated the criminal behavior of one of its energy traders, Gordon, through its in-house legal staff and outside counsel. That investigation culminated in two written reports.[175] In response to public reports of the theft, the lead client services partner at Deloitte & Touche, Merrill Lynch's outside auditor, spoke with Merrill Lynch's internal audit head, McDermott, about Gordon's conduct and Merrill Lynch's subsequent actions.[176] McDermott gave the investigative reports to Deloitte & Touche to help it identify potential internal control, accounting, or audit issues of which it was not otherwise aware through the audit process.[177] McDermott provided the reports to Deloitte & Touche with the understanding that they were prepared by counsel and were therefore privileged, that Deloitte & Touche would keep them confidential, and that Deloitte & Touche would disclose them to no one.[178] Allegheny later sought to discover the reports in litigation arising out of a transaction allegedly affected by Gordon's conduct. Merrill Lynch conceded that by giving the reports to Deloitte & Touche it waived the attorney-client privilege with respect to them, but contended that they were protected from discovery by the work product doctrine.[179]

Allegheny did not dispute that the reports were work product; it contended that Merrill Lynch waived work product immunity when it provided them to Deloitte & Touche.[180] The *Merrill Lynch* court disagreed, framing "the critical inquiry" as whether "Deloitte & Touche should be conceived of as an adversary or a conduit to a potential adversary."[181] Deloitte & Touche was neither of those things in the court's view, and further, it was largely aligned in interest with Merrill Lynch.[182] As the court explained:

> [A]ny tension between an auditor and a corporation that arises from an auditor's need to scrutinize and investigate a corporation's records and book-keeping practices simply is not the equivalent of an adversarial relationship contemplated by the work product doctrine. Nor should it be. A business and its auditor can and should be aligned insofar as they both seek to prevent, detect, and root out corporate fraud. Indeed, this is precisely the type of limited alliance

174. No. 02 Civ. 7689(HB), 2004 WL 2389822 (S.D.N.Y. Oct. 26, 2004).
175. *Id.* at *2.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at *3.
180. *Id.* at *4.
181. *Id.* at *6.
182. *Id.*

that courts should encourage.[183]

Moreover, as the court intuitively observed, construing a company's auditor as an adversary, and thus obliterating the work product doctrine in these circumstances, "could very well discourage corporations from conducting a critical self-analysis and sharing the fruits of such an inquiry with the appropriate actors."[184]

The court recognized the argument that shielding the reports from Allegheny might be seen as lessening auditors' independence, but easily rejected it, stating:

> This conclusion does not necessarily mean that auditors will be any less independent. . . . Instead, the aim should be for corporations to share information with their auditors to facilitate a meaningful review and, ultimately, the availability of more accurate information for the investing public. It is also important to encourage complete disclosure between a company and its auditor, so that auditors are not inadvertently shielded from complete frankness by corporate management, so that they can later claim that they had no knowledge of alleged malfeasance.[185]

The court found that Allegheny was not entitled to discover Merrill Lynch's two internal reports.[186] The fact that Merrill Lynch and Deloitte & Touche were not adversaries defeated Allegheny's waiver argument.[187]

The court in *In re Raytheon Securities Litigation*[188] took a slightly different approach, although one generally consistent with that taken by the *Medinol* court. With respect to attorneys' audit response letters, the court concluded that "[t]o the extent the information in these letters must be disclosed in the public financial statements of the company being audited, it is not entitled to work product protection" even under the broadest measure of that immunity.[189] As for documents that lawyers prepare and later share with auditors to assist the auditors in their work, such sharing may waive work product protection if securities laws or accounting rules mandate public disclosure of the information they contain.[190] Courts probably will be required to view such documents *in camera* to determine "the scope of litigation information an independent auditor or audited company can reasonably be expected to disclose in

183. *Id.*
184. *Id.* at *7.
185. *Id.*
186. *Id.* at *8.
187. *Id.*
188. 218 F.R.D. 354 (D. Mass. 2003).
189. *Id.* at 359.
190. *See id.* at 360.

public financial reports."[191]

In summary, the confidentiality of communications with auditors is an unsettled aspect of the work product doctrine. Most of the decisions on the subject have been rendered by district courts and, therefore, lack precedential value.[192] Lawyers wishing to improve the chances that the disclosure of information to auditors will not waive work product immunity should condition disclosure on the auditor's promise to keep the information confidential.[193] Auditors should further be required to inform the client or the lawyers of attempts to discover the information so that the client or the lawyers can resist discovery if they so choose.

V. Selective Waiver

Clients can voluntarily waive the attorney-client privilege. When a client voluntary waives the privilege, the waiver encompasses not only the disclosed communication, but further extends to "whatever additional communications must be provided to the third party to give that party a fair chance to meet the advantages gained by the privilege holder through the disclosure."[194] Courts do not permit "selective waiver" of the privilege; they do not allow a party to waive only those communications that are favorable to its case and resist disclosure of communications that are unfavorable.[195]

This traditional view of selective waiver has been expanded, such that the situation or scenario described above is best described as "partial waiver."[196] "Selective waiver," as that term is commonly understood today, refers to a situation in which a client reveals confidential communications to one outsider while withholding them from another.[197] The typical situation is one in which a company is facing a government inquiry and, as part of that inquiry, either wishes to reveal privileged or immune information to the government, or is arguably compelled to do so. At the same time, the company is facing pending or imminent civil litigation arising out of the same set of facts that spawned the

191. *Id.*

192. *See* FutureSource LLC v. Reuters Ltd., 312 F.3d 281, 283 (7th Cir. 2002) (stating that "[t]he reasoning of district judges is of course entitled to respect, but the decision of a district judge cannot be a controlling precedent").

193. *See Merrill Lynch*, 2004 WL 2389822, at *1.

194. 2 RICE ET AL., *supra* note 50, § 9:79, at 357-58.

195. *Id.* at 361; *see also* Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1423 n.7 (3d Cir. 1991) (describing this approach as "partial waiver" and explaining that "[p]artial waiver permits a client who has disclosed a portion of privileged communications to continue asserting the privilege as to the remaining portions of the same communications").

196. *See Westinghouse*, 951 F.2d at 1423 n.7.

197. *See* United States v. Mass. Inst. of Tech., 129 F.3d 681, 685 (1st Cir. 1997).

government inquiry. The company believes that it must waive the privilege or work product immunity as to the government; however, the plaintiffs in the civil litigation then will use the information revealed to the government to great advantage. Thus, the company attempts to selectively waive the privilege or immunity, producing otherwise privileged or immune information to the government, perhaps accompanied by the government's promise to maintain the confidentiality of the disclosed information, while withholding that same information from the plaintiffs in the civil case. Courts have largely rejected this approach to selective waiver.[198] A disclosure of confidential information to one outsider generally waives the privilege and work product immunity as to all outsiders, as explained in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*.[199]

In re Columbia/HCA arose out of a Department of Justice ("DoJ") investigation of Columbia/HCA for possible Medicaid and Medicare fraud. Either in anticipation of this investigation, or in response to it, Columbia/HCA conducted internal audits of its Medicare patient records, focusing on the billing codes assigned to patients in order to receive Medicare reimbursement.[200] Ultimately, Columbia/HCA began negotiating with the government to settle the fraud investigation. As part of this effort, Columbia/HCA agreed to produce some of its internal audit documents to the DoJ.[201] In exchange for this cooperation, the DoJ

198. *See, e.g.*, *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 302-07 (6th Cir. 2002) (holding that defendant waived its privilege and work product immunity); *Mass. Inst. of Tech.*, 129 F.3d at 684-88 (finding waiver of privilege and work product immunity); *In re* Steinhardt Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993) (finding waiver of work product immunity where there was no confidentiality agreement with the SEC); *Westinghouse*, 951 F.2d at 1423-31 (finding waiver of privilege and work product immunity); *In re* Martin Marietta Corp., 856 F.2d 619, 623-26 (4th Cir. 1988) (finding waiver of privilege and tangible work product but not opinion work product); Permian Corp. v. United States, 665 F.2d 1214, 1219-22 (D.C. Cir. 1981) (finding waiver of attorney-client privilege); *In re* Syncor ERISA Litig., 229 F.R.D. 636, 645 (C.D. Cal. 2005) (rejecting attorney-client privilege and work product immunity claims); McKesson HBOC, Inc. v. Superior Court, 9 Cal. Rptr. 3d 812, 819-21 (Cal. Ct. App. 2004) (finding waiver of privilege and work product); McKesson Corp. v. Green, 610 S.E.2d 54, 56 (Ga. 2005) (agreeing with lower court that defendant waived work product immunity). *But see* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (recognizing selective waiver concept); Maruzen Co. v. HSBC USA, Inc., No. 00 CIV. 1079(RO), 00 CIV. 1512(RO), 2002 WL 1628782, at **1-2 (S.D.N.Y. July 23, 2002) (holding that work product immunity not waived where defendants had confidentiality agreements with government agencies); Saito v. McKesson HBOC, Inc., No. Civ.A. 18553, 2002 WL 31657622, at **7-11 (Del. Ch. Nov. 13, 2002) (involving work product and adopting selective waiver rule where disclosures are made to law enforcement agencies under a confidentiality agreement).

199. 293 F.3d 289 (6th Cir. 2002).

200. *Id.* at 291-92.

201. *Id.* at 292.

agreed to certain confidentiality provisions. The agreement under which the documents were produced to the DoJ provided that:

> [t]he disclosure of any report, document, or information by one party to the other does not constitute a waiver of any applicable privilege or claim under the work product doctrine. Both parties reserve the right to contest the assertion of any privilege by the other party to the agreement, but will not argue that the disclosing party, by virtue of the disclosures it makes pursuant to this agreement, has waived any applicable privilege or work product doctrine claim.[202]

The DoJ and Columbia/HCA eventually settled the fraud investigation, with Columbia/HCA paying an $840 million fine.[203] When the results of the investigation came to light, a number of insurance companies and individuals began scrutinizing their bills from Columbia/HCA. This resulted in numerous lawsuits in which the plaintiffs alleged that Columbia/HCA over-billed them for its services.[204] The plaintiffs naturally sought to obtain copies of the audits that Columbia/HCA provided to the government.[205] Columbia/HCA resisted on attorney-client privilege and work product grounds, but lost those arguments in the trial court.[206] The case then made its way to the Sixth Circuit on an interlocutory appeal by Columbia/HCA.

Columbia/HCA argued that it could selectively waive its attorney-client privilege and work product immunity; that is, the disclosure of its internal documents to the government was not a waiver as to the various private plaintiffs, especially in light of its confidentiality agreement with the DoJ.[207] After conducting an extensive analysis of the selective waiver doctrine,[208] the court addressed the doctrine in the attorney-client privilege context and, for several reasons rejected "the concept of selective waiver, in any of its various forms."[209]

First, the selective waiver doctrine does not foster full and frank communications between the client and attorney, which is one of the principal reasons for recognizing the attorney-client privilege.[210] The approach urged by Columbia/HCA and other selective waiver advocates merely encourages the voluntary disclosure of otherwise confidential information to government agencies; the attorney-client privilege was

202. *Id.* (quoting agreement) (footnote omitted).
203. *Id.*
204. *Id.*
205. *Id.* at 293.
206. *Id.*
207. *See id.*
208. *See id.* at 295-302.
209. *Id.* at 302.
210. *See id.*

never intended to protect a client's communications with the government.[211] Second, any form of selective waiver transforms the attorney-client privilege into just another tactical weapon in litigation.[212] Third, and with respect to the idea that a confidentiality agreement legitimizes selective waiver, the attorney-client privilege derives from the common law.[213] "It is not a creature of contract, arranged between parties to suit the whim of the moment."[214] Although the recognition of selective waiver where a confidentiality agreement is employed may protect the expectations of the parties to the agreement, it does not serve "the 'public ends' of adequate legal representation that the attorney-client privilege is intended to protect."[215]

The court acknowledged that there was considerable appeal to selective waiver when the initial disclosure is to an arm of the government.[216] By waiving the privilege as to the government, the client furthers the truth-seeking process and increases the likelihood of corporate self-policing.[217] Unfortunately, this argument has no logical stopping point. Insofar as truth seeking is concerned, private litigants many times stand in the government's shoes, especially in shareholder derivative suits and qui tam actions.[218] Furthermore, a countervailing argument can be made that the government should not hinder the truth-seeking process by entering into confidentiality agreements. The government "should act to bring to light illegal activities, not to assist wrongdoers in concealing the information from the public domain."[219]

In the end, a client's decision to negotiate a settlement, and in those negotiations reveal confidential information, is simply a tactical decision. That decision, like all other tactical decisions in litigation, has "an upside and a downside."[220] The downside for the client, quite obviously, is the certain loss of its privilege across the board.[221]

After dealing with the attorney-client privilege, the court turned to the work product doctrine. The court noted at the outset that

211. *Id.* (quoting Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1425 (3d Cir. 1991)).
212. *Id.* (quoting *In re* Steinhardt Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993)).
213. *Id.* at 303.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 304.
221. *See id.* ("Just as the attorney-client privilege itself provides certainty to litigants that information relayed to one's attorney will not be disclosed, rejection of selective waiver provides further certainty that waiver of the privilege ensures that the information will be disclosed.") (footnote omitted).

Columbia/HCA's waiver of the attorney-client privilege did not necessarily mean that it also had waived work product immunity.[222] But, the court then embarked on analysis of selective waiver cases that did not bode well for Columbia/HCA.[223]

In ultimately determining that Columbia/HCA waived work product immunity, the court noted that in the selective waiver context, the initial disclosure of confidential information must be made to an adversary.[224] That clearly was the situation at hand; there was no doubt that the DoJ was Columbia/HCA's adversary at the time of the disclosures.[225] That being so, there was no compelling reason to differentiate between selective waiver of the privilege and selective waiver of work product immunity:[226]

> Many of the reasons for disallowing selective waiver in the attorney-client privilege context also apply to the work product doctrine. The ability to prepare one's case in confidence, which is the chief reason articulated . . . for the work product protections, has little to do with talking to the Government. Even more than attorney-client privilege waiver, waiver of the protections afforded by the work product doctrine is a tactical litigation decision. Attorney and client both know the material in question was prepared in anticipation of litigation; the subsequent decision on whether or not to "show your hand" is quintessential litigation strategy. Like attorney-client privilege, there is no reason to transform the work product doctrine into another "brush on the attorney's palette," used as a sword rather than a shield.[227]

The court concluded that the standard for selectively waiving work product immunity should be no more stringent than the standard for selectively waiving the attorney-client privilege. Once work product immunity is waived, "waiver is complete and final."[228]

It is difficult to dispute the *In re Columbia/HCA* court's reasoning as to selective waiver of the attorney-client privilege. The voluntary disclosure of confidential communications to a third-party generally waives the privilege.[229] An investigating government agency is not within the magic circle of others with whom the client shares a common

222. *Id.* (quoting and citing cases).
223. *See id.* at 305-06.
224. *Id.* at 306 n.28.
225. *Id.*
226. *Id.* at 306.
227. *Id.* at 306-07 (citations omitted).
228. *Id.* at 307.
229. *In re* Keeper of the Records, 348 F.3d 16, 23 (1st Cir. 2003); Genentech, Inc. v. United States Int'l Trade Comm'n, 122 F.3d 1409, 1415 (Fed. Cir. 1997).

interest; the investigating agency is an adversary.[230] Nor can a client who voluntarily shares confidential information with the government generally argue that it was compelled to do so, making its disclosure involuntary.[231] Though it is true that failure to cooperate with the government may subject the client to potentially harsh criminal or civil penalties, the client is free to decide that whatever punishment the government might mete out is not as bad as the potential result in related civil litigation if confidential information is revealed, and thus assert the attorney-client or work product immunity against the government.[232]

There is no logical basis to forge a "government investigation exception" to the selective waiver doctrine, as some urge.[233] As the *In re Columbia/HCA* court explained, such an exception has no logical limits.[234] There is nothing to suggest that the recognition of a government investigation exception is necessary to encourage parties to voluntarily cooperate with government agencies; indeed, corporations have long cooperated in government investigations despite the fact that their associated disclosures are neither privileged nor immune from discovery in other contexts.[235] Contrary to the view expressed by the dissent in *In re Columbia/HCA*, an exception cannot be justified on the basis that government investigations are "generally more important" than civil litigation arising out of the same set of facts.[236]

Consider a case in which a large corporation engages in accounting fraud so serious that investors are ruined, or employees lose their pensions.[237] The fact that the government may extract a large fine from the corporation, or send its officers to prison, may give investors or employees some sense of satisfaction, but it does nothing to lessen their financial harm. On the other hand, civil litigation against those who allegedly perpetrated or aided and abetted the fraud may restore some of

230. *See* United States v. Mass. Inst. of Tech., 129 F.3d 681, 684-85 (1st Cir. 1997).

231. *See id.* at 686 ("Anyone who chooses to disclose a privileged document to a third party . . . has an incentive to do so, whether for gain or to avoid disadvantage.").

232. This argument admittedly holds less force in criminal matters where an indictment would put a company out of business and to avoid indictment the company must "cooperate" with the government, such cooperation to include waiving its attorney-client privilege and work product immunity.

233. *See, e.g.*, *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 308 (6th Cir. 2002) (Boggs, C.J., dissenting) (advocating "a government investigation exception to the third-party waiver rule").

234. *Id.* at 303 (quoting *Mass. Inst. of Tech.*, 129 F.3d at 686).

235. *See* Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1426 (3d Cir. 1991) (discussing corporations' cooperation in SEC investigations).

236. *In re Columbia/HCA*, 293 F.3d at 312 (Boggs, C.J., dissenting).

237. *See* Howard Witt, *Lay Says He Is Much Poorer—And Misunderstood*, CHI. TRIB., July 9, 2004, at 18 (reporting former Enron CEO Ken Lay's acknowledgement that many former Enron employees and shareholders lost their life savings and retirement funds in the company's collapse).

the losses suffered by shareholders or employees.[238] In these circumstances, civil litigation is by any objective measure "more important" than an associated government inquiry. As for subjective considerations, such as deterrence, large judgments and settlements in civil cases deter other potential offenders just as well as regulatory penalties or criminal fines.

With respect to the work product doctrine, it is generally accepted that the voluntary disclosure of work product to an adversary waives any immunity that would otherwise attach to the information revealed.[239] After all, the need for immunity disappears as soon as work product is shared with the adversary.[240] Even so, some courts hold that work product immunity survives voluntary disclosure to the government where disclosure is made pursuant to a confidentiality agreement,[241] or where the information disclosed constitutes opinion work product as compared to tangible work product.[242]

As a practical matter, clients and attorneys who disclose confidential information to government agencies in adversarial roles should expect that their disclosures waive the attorney-client privilege and work product immunity.[243] To the extent that they want to try to protect that information from other outsiders, they should produce it pursuant to an agreement that obligates the government to maintain the confidentiality of the information disclosed. That agreement should

238. *See, e.g.*, *Morgan Pays $2.2 Billion on Enron*, CHI. TRIB., June 15, 2005, § 3, at 3 (reporting that JPMorgan Chase & Co. agreed to pay $2.2 billion to settle a class action lawsuit over its role in helping Enron Corp. engineer its far-reaching frauds).

239. *In re* Steinhardt Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993); *Westinghouse*, 951 F.2d at 1428 (distinguishing between disclosures to adversaries and third-parties).

240. *In re Steinhardt Partners*, 9 F.3d at 235.

241. *See, e.g.*, *In re* Natural Gas Commodity Litig., No. 03 Civ. 6186VMAJP, 2005 WL 1457666, at *9 (S.D.N.Y. June 21, 2005); *In re* McKesson HBOC, Inc., No. 99-CV-20743, 2005 WL 934331, at *10 (N.D. Cal. Mar. 31, 2005); Maruzen Co. v. HSBC USA, Inc., No. 00 CIV. 1079(RO), 00 CIV. 1512(RO), 2002 WL 1628782, at **1-2 (S.D.N.Y. July 23, 2002); Saito v. McKesson HBOC, Inc., No. Civ.A. 18553, 2002 WL 31657622, at **7-11 (Del. Ch. Nov. 13, 2002); *see also In re Steinhardt Partners*, 9 F.3d at 236 (suggesting that there might be no waiver of work product immunity where a disclosing party and the SEC "have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials").

242. *See, e.g.*, *In re* Martin Marietta Corp., 856 F.2d 619, 625-26 (4th Cir. 1988).

243. There are cases in which a party communicates with the government in connection with an investigation into its alleged conduct and the government later seeks disclosure of materials supporting those communications or additional related communications. When the party resists, claiming that in cooperating it never intended to waive the attorney-client privilege or work product immunity, the government asserts that it impliedly waived all claims of privilege or immunity through its voluntary communications. Courts reject this approach on fairness grounds. *See, e.g.*, John Doe Co. v. United States, 350 F.3d 299, 302-07 (2d Cir. 2003) (finding no work product waiver); *In re* Keeper of the Records, 348 F.3d 16, 26-29 (1st Cir. 2003) (finding no privilege waiver).

further provide that the disclosing party is providing the information in reliance upon the government's promise of confidentiality, and that the party reserves the right to assert the attorney-client privilege and work product immunity against third parties. There is a chance that such an agreement will maintain the privilege and immunity, especially in states where the issue has not already been decided in favor of disclosure.[244] The chances of success are slimmer in federal courts, where the clear weight of authority flatly rejects selective waiver.[245] Even here, however, work product immunity may survive if the information disclosed to the government is accompanied by a well-drafted confidentiality agreement.

An interesting selective waiver dilemma arises where work product is at issue and the attorney does not want it revealed. Assume, for example, that ABC Corporation is the subject of a government investigation. The government demands that ABC waive its attorney-client privilege and work product immunity in connection with the investigation. ABC decides to do so in an effort to avoid possible criminal charges.[246] This concerns ABC's regular outside counsel, Attorney, who worries that the surrender of his work product may expose him to criminal charges, or to a civil action for fraud, based on advice he gave ABC. Can Attorney prevent ABC from giving his work product to the government?

Because both the lawyer and the client hold work product immunity, the client may waive it as to itself,[247] but the client may not waive its lawyer's work product immunity.[248] In many instances, however, a lawyer's ability to protect her work product will be short lived. In cases involving allegations of crime or fraud, the government will be able to use the work product revealed by the client to argue that

244. *See Saito*, 2002 WL 31657622, at **7-8 (involving work product immunity).

245. In 2003, the Securities and Exchange Commission ("SEC") recommended that Congress enact legislation to enhance the SEC's ability to obtain significant but otherwise unobtainable information (i.e., information that is either privileged or immune). THE AUDITOR'S NEED, *supra* note 156, at 13. In May 2003, members of Congress introduced H.R. 2179, which proposes an amendment to the 1934 Securities & Exchange Act to provide that in certain circumstances a person or entity may provide privileged or immune materials to the SEC or another appropriate regulatory agency without waiving attorney-client privilege or work product protections. *Id.* at 13-14 (quoting H.R. 2179). Of course, even if H.R. 2179 becomes law, it will not protect against waiver in all situations or circumstances involving the federal government. *See id.* at 14 (noting this fact with respect to communications with outside auditors).

246. *See* Andrew Longstreth, *Double Agent,* AM. LAW., Feb. 2005, at 68, 70 (noting that companies "now readily waive the privilege" in such circumstances).

247. *In re* Grand Jury Proceedings, 43 F.3d 966, 972 (5th Cir. 1994); *In re* Grand Jury Proceedings, Thurs. Special Grand Jury Sept. Term, 1991, 33 F.3d 342, 349 (4th Cir. 1994); *In re* Doe, 662 F.2d 1073, 1079 (4th Cir. 1981).

248. *In re Grand Jury*, 43 F.3d at 972; *In re Doe,* 662 F.2d at 1079.

the crime-fraud exception to the work product doctrine vitiates the attorney's work product immunity.[249] Once the government makes a prima facie crime-fraud showing, the lawyer's work product immunity is gone, and the government will obtain all of the lawyer's documents and information.[250]

VI. Common Interest Arrangements

Lawsuits and other adversarial proceedings often involve multiple defendants. Co-defendants and joint targets of government inquiries may share common interests in their defense of matters, and thus want to coordinate their efforts without destroying the privileged status of their communications with their respective lawyers. Such cooperation is possible by virtue of the "common interest doctrine," which is an exception to the general rule that the disclosure of privileged information to third parties waives the attorney-client privilege.[251] The common interest doctrine effectively widens the circle of people to whom clients may disclose confidential communications.[252]

Under the common interest doctrine, the "sharing of privileged information that otherwise would constitute a waiver does not relinquish the protections of the privilege, so long as the parties maintain the confidentiality of the shared information."[253] Although developed in the context of the attorney-client privilege, the common interest doctrine has been expanded to protect against the waiver of work product immunity.[254]

Common interest arrangements differ from situations in which a single lawyer represents two clients with common interests. Where a single lawyer represents co-clients, communications between the co-clients to the lawyer about the matter of mutual interest are not privileged as between the clients.[255] If the clients want to keep their separate communications with their lawyer confidential from one another, they

249. *See In re Doe*, 662 F.2d at 1079-81.

250. *In re Grand Jury Proceedings, Thurs. Special*, 33 F.3d at 348 (holding that to overcome opinion work product the government need only make a prima facie crime fraud showing; there is no requirement that it show something more than is necessary to obtain the attorney's fact work product).

251. Black v. S.W. Water Conservation Dist., 74 P.3d 462, 469 (Colo. Ct. App. 2003).

252. Boyd v. Comdata Network, Inc., 88 S.W.3d 203, 214 (Tenn. Ct. App. 2002).

253. Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why it is Misguided)*, 48 VILL. L. REV. 469, 511 (2003) (footnotes omitted).

254. *See* Ariz. Indep. Redistricting Comm'n v. Fields, 75 P.3d 1088, 1100-01 (Ariz. Ct. App. 2003).

255. Brandon v. W. Bend Mut. Ins. Co., 681 N.W.2d 633, 639 (Iowa 2004).

must expressly so agree.[256] Under the common interest doctrine, on the other hand, the parties' common interest does not imply an agreement to share all relevant information.[257]

A. Joint Defense Agreements in Litigation

The common interest doctrine often surfaces where a plaintiff sues multiple defendants, who then share a common interest in defeating the plaintiff's claims. To present a unified front, the defendants, represented by different lawyers, agree to coordinate their defense by way of a "joint defense agreement," with their communications protected by a "joint defense privilege."[258] In fact, the joint defense privilege is not a new or separate privilege.[259] Rather, it is a common interest arrangement that, like all other common interest arrangements, assumes the existence of a valid underlying attorney-client privilege.[260] A joint defense agreement itself does not create a common interest or joint defense privilege.[261]

The joint defense privilege also protects group members' work product.[262] For the joint defense privilege to apply to work product, it must be shown that the information at issue falls within the ambit of the qualified immunity afforded by the work product doctrine. Again, the joint defense privilege protects against waiver, assuming valid underlying immunity—it does not create a new form of protection.[263]

To assert the joint defense privilege, a party must establish (1) that the protected communications were made in the course of a joint litigation effort, and (2) that they were designed to further that effort.[264]

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256. *See* RESTATEMENT, *supra* note 24, at § 75 cmt. d.

257. *Id.* § 76 cmt. e.

258. Multiple plaintiffs may enter into joint prosecution agreements that spawn the same privilege and confidentiality issues. *See, e.g.*, Summers v. UAL Corp. ESOP Comm., No. 03 C 1537, 2004 WL 2583877 (N.D. Ill. Nov. 10, 2004); Associated Wholesale Grocers, Inc. v. Americold Corp., 975 P.2d 231 (Kan. 1999).

259. Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc., 215 F.R.D. 466, 470 (S.D.N.Y. 2003).

260. *In re* Syncor ERISA Litig., 229 F.R.D. 636, 645 (C.D. Cal. 2005); *see, e.g.*, Cavallaro v. United States, 284 F.3d 236, 250-51 (1st Cir. 2002) (common interest doctrine afforded no protection from discovery where there was no valid underlying claim of attorney-client privilege).

261. Ariz. Indep. Redistricting Comm'n v. Fields, 75 P.3d 1088, 1099 n.11 (Ariz. Ct. App. 2003); OXY Resources Cal. LLC v. Superior Court, 9 Cal. Rptr. 3d 621, 637-38 (Cal. Ct. App. 2004); Brooklyn Navy Yard Cogeneration Partners, L.P. v. PMNC, 753 N.Y.S.2d 343, 345 (N.Y. Sup. Ct. 2002) (quoting case).

262. Ferko v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 219 F.R.D. 396, 401 (E.D. Tex. 2003); Lugosch v. Congel, 219 F.R.D. 220, 240 (N.D.N.Y. 2003).

263. Metro Wastewater Reclamation Dist. v. Cont'l Cas. Co., 142 F.R.D. 471, 478 (D. Colo. 1992).

264. Grand Jury Proceedings v. United States, 156 F.3d 1038, 1042-43 (10th Cir. 1998).

Of course, the communications to be protected must have been made in confidence[265] and must further the parties' joint defense. If communications are not intended to further the parties' joint defense, but instead relate to claims that the parties may have against one another, they are discoverable.[266]

A joint defense group member who wants to keep information it shares with its attorney from being disclosed to other members of the group must request such confidentiality from counsel. Otherwise, it is assumed that any information exchanged as part of the joint defense effort can be freely disclosed to other members of the defense group and their counsel.[267]

1. Cases and Controversies

Most joint defense problems involve client confidences. Typically, counsel for one member of a joint defense group formerly represented the plaintiff. The plaintiff alleges that its former attorneys possess its confidential information, that the attorneys have shared that information with the other members of the joint defense group, or should be presumed to have done so, and that all defense counsel must be disqualified as a result. This implicates Model Rule 1.9(a), which as amended in 2002 provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.[268]

The prior version of the rule was nearly identical, except that the former client was only required to consent "after consultation;" the principle that such consent had to be informed was implied rather than express, and there was no requirement that the consent be confirmed in writing.[269]

One of the primary purposes of Rule 1.9 is to protect former clients' confidences.[270] Because it would be very difficult for the former client to demonstrate that the attorney revealed its confidences to its detriment,

265. Boyd v. Comdata Network, Inc., 88 S.W.3d 203, 214 (Tenn. Ct. App. 2002).

266. *See, e.g.*, Brooklyn Navy Yard Cogeneration Partners, L.P. v. PMNC, 753 N.Y.S.2d 343, 345-46 (N.Y. Sup. Ct. 2002).

267. Ageloff v. Noranda, Inc., 936 F. Supp. 72, 76-77 (D.R.I. 1996).

268. MODEL RULES, *supra* note 97, at R. 1.9(a).

269. A.B.A., THE 2002 CHANGES TO THE ABA MODEL RULES OF PROF'L CONDUCT 37-40 (2003) (showing the 2002 amendments to Model Rule 1.9) [hereinafter THE 2002 CHANGES].

270. Douglas R. Richmond, *The Rude Question of Standing in Attorney Disqualification Disputes,* 25 AM. J. TRIAL ADVOC. 17, 26 (2001).

most courts presume a breach of confidence once the potential for the disclosure of confidential information is shown.[271] Some courts go further and impute the disclosure of the former client's confidences to other lawyers in the subject lawyer's firm, thus disqualifying the entire firm.[272] *National Medical Enterprises, Inc. v. Godbey*[273] is an illustrative case.

National Medical Enterprises ("NME") retained Ed Tomko of the law firm of Baker & Botts to represent two of its former executives, Cronen and Wicoff, in connection with a number of criminal investigations and civil suits arising out of NME's operation of psychiatric hospitals. While representing Cronen and Wicoff, Tomko obtained confidential information from them and from NME, as well as in conferences and meetings at which a joint defense was discussed.[274]

Tomko's communications with NME, its employees and former employees, and their counsel, was subject to a joint defense agreement. That agreement provided in pertinent part:

> 1. Unless expressly stated in writing to the contrary, any communications between or among any of the client members and/or the attorney members . . . are confidential and are protected from disclosure to any third party by the joint defense privilege, the attorney-client privilege and the work product doctrine.
>
> 3. None of the information obtained by any client member or any attorney member pursuant to this agreement shall be disclosed to any third party without the consent of the attorney member who disclosed the information in the first instance.
>
> 6. Each client member understands and acknowledges . . . that he or she is represented by his or her own attorney in this matter; that while the attorneys representing the other members have a duty to preserve the confidences disclosed to them pursuant to this agreement, they will not be acting as his or her attorney in this matter; and that the attorney representing the other client members will owe a duty of

271. *See, e.g.*, Bergeron v. Mackler, 623 A.2d 489, 494 (Conn. 1993); Chrispens v. Coastal Ref. & Mktg., Inc., 897 P.2d 104, 114 (Kan. 1995); Sullivan County Reg'l Refuse Disposal Dist. v. Town of Acworth, 686 A.2d 755, 758 (N.H. 1996); Cont'l Resources, Inc. v. Schmalenberger, 656 N.W.2d 730, 736-37 (N.D. 2003); State v. Crepeault, 704 A.2d 778, 783 (Vt. 1997); State *ex rel.* Ogden Newspapers, Inc. v. Wilkes, 566 S.E.2d 560, 563 (W. Va. 2002).

272. *See, e.g.*, Flatt v. Superior Court, 885 P.2d 950, 954 (Cal. 1994); *In re* Guardianship of Mowrer, 979 P.2d 156, 159 (Mont. 1999); Bechtold v. Gomez, 576 N.W.2d 185, 190 (Neb. 1998); Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 131 (Tex. 1996).

273. 924 S.W.2d 123 (Tex. 1996).

274. *Id.* at 125.

> loyalty to their own respective clients only. Each client member further understands and acknowledges that the attorney members representing other client members have the right, and may have the obligation, to take actions against his or her own interest. . . .[275]

Tomko and Baker & Botts ultimately withdrew from representing Cronen and Wicoff for reasons unrelated to the looming dispute.[276] Some seventeen months later, Baker & Botts sued NME on behalf of a number of former NME patients. The allegations in this suit tracked those in the matters in which Tomko had represented Cronen and Wicoff, although the Baker & Botts lawyers suing NME had not been involved in Cronen's and Wicoff's defense.[277]

NME moved to disqualify Baker & Botts on the grounds that Tomko obtained confidential information from NME and that all Baker & Botts lawyers presumptively had access to that information.[278] Cronen filed his own motion to disqualify Baker & Botts, although he was not a defendant in the new suit. The trial court denied both motions.[279] NME and Cronen filed a petition for mandamus with the Texas Supreme Court.[280]

The *National Medical Enterprises* court began by observing that Baker & Botts' disqualification turned on whether Tomko should be disqualified under the circumstances.[281] Although Tomko never represented NME in the Cronen and Wicoff matters, the lack of an attorney-client relationship did not mean that he owed NME no duties. Tomko, like all parties to the joint defense agreement, had a duty to preserve shared confidences.[282] Even though he never represented NME, "he was admitted into its confidences with his pledge to preserve them."[283] Even if there were a way for him to honor his joint defense obligations while prosecuting claims against NME, such conduct would create a strong appearance of impropriety.[284]

Given that Tomko could not represent the plaintiffs, the question then became whether the other Baker & Botts attorneys should be disqualified.[285] There was no evidence that Tomko had disclosed NME's confidences to the Baker & Botts lawyers representing the plaintiffs.

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275. *Id.*
276. *Id.*
277. *See id.* at 126-27.
278. *Id.* at 126.
279. *Id.* at 126-27.
280. *Id.* at 128.
281. *Id.* at 128-29.
282. *Id.* at 129.
283. *Id.*
284. *Id.*
285. *Id.* at 131.

Indeed, Tomko had gone to great lengths to screen the information from disclosure.[286]

Under Texas law, there is an irrebuttable presumption that an attorney in a law firm has access to the confidences of the clients and former clients of all other attorneys in the firm.[287] The *National Medical Enterprises* court saw no reason why the presumption should not apply to the situation at hand, stating:

> The attorney's duty to preserve confidences shared under a joint defense agreement is no less because the person to whom they belong was never a client. The attorney's promise places him in the role of a fiduciary, the same as toward a client. . . . The difficulty in proving a misuse of confidences, and the anxiety that a misuse may occur, is no less for the non-client. The doubt cast upon the legal profession is the same in either situation. Because the reasons for the presumption apply equally in both situations, and there are no other bases for differentiating between them, we hold that an attorney's knowledge of a non-client's confidential information that he has promised to preserve is imputed to other attorneys in the same law firm.[288]

The court next turned to Cronen's motion to disqualify Baker & Botts. The only question there was whether Baker & Botts' representation of the plaintiffs was adverse to Cronen. The court concluded that it was, and thus disqualified Baker & Botts.[289]

Perhaps the leading disqualification case arising out of a joint defense agreement is *Essex Chemical Corp. v. Hartford Accident & Indemnity Co.*,[290] which stemmed from a 1988 takeover attempt of Essex Chemical Corp. and Essex Specialty Products. Skadden, Arps, Slate, Meagher & Flom represented Essex in all takeover and acquisition negotiations, and in subsequent litigation. Skadden had access to numerous Essex documents relating to all aspects of its business, and it worked closely with Essex personnel and advisors, including the company's in-house counsel and investment banker.[291]

Several years later, Essex sued several insurance companies in a declaratory judgment action. One of Essex's insurers, Home, retained Skadden to represent it in that action. In 1996, the various defendants in the coverage litigation, including Skadden, entered into a joint defense agreement. Thereafter, Essex moved to disqualify Skadden, and it further sought to disqualify the remaining five defense firms based on

286. *Id.*
287. *Id.*
288. *Id.* at 132.
289. *Id.* at 133.
290. 993 F. Supp. 241 (D.N.J. 1998).
291. *Id.* at 243-44.

their execution of the joint defense agreement.[292]

The magistrate on the case granted Essex's motion to disqualify all defense counsel, ruling that Skadden's disqualification was mandated by New Jersey Rule of Professional Conduct 1.9(a)(1). The other defense counsel had to be disqualified because their participation in the joint defense group created a risk that the confidential information that Skadden acquired from Essex could be used to the company's detriment in the current action.[293] The magistrate further concluded, without looking at the joint defense agreement, that the defendants' execution of the agreement gave rise to an implied attorney-client relationship between Essex and all defense counsel.[294] This eliminated Essex's need to show that the other defense firms actually received confidential information from Skadden. The magistrate also found that the joint defense privilege prevented defense counsel from rebutting the presumption of shared confidences.[295] Finally, the magistrate found that the joint defense agreement created an appearance of impropriety that compelled the disqualification of all defense counsel.[296]

The defendants appealed to the district court, which first found that the magistrate's application of an irrebuttable presumption of shared confidences between Skadden and the other defense counsel was improper.[297] This required a double imputation of knowledge: first from the Skadden attorneys involved in the 1988 litigation to all Skadden attorneys, and then from Skadden to all defense counsel.[298] Double imputation requires painstaking factual analysis, which the magistrate did not employ. Defense counsel had to be given the opportunity to establish (1) that they acquired no confidential information from Skadden, and (2) the precise nature of the relationship among all defense counsel. An examination of the joint defense agreement, which defined the group members' relationship and obligations, was essential.[299]

The court next found that the magistrate erred in finding that the joint defense agreement gave rise to an implied attorney-client relationship between Essex and all members of the joint defense group, stating that the magistrate's determination was "contrary to law and unsupported by the record."[300]

With respect to the alleged appearance of impropriety

292. *Id.* at 244.
293. *Id.*
294. *Id.* at 245.
295. *Id.*
296. *Id.*
297. *Id.* at 251.
298. *Id.*
299. *Id.* at 252.
300. *Id.* at 253.

accompanying Skadden's participation in the joint defense group, the *Essex Chemical* court noted that whether an appearance of impropriety exists must be determined from the viewpoint of informed and concerned citizens.[301] This requires a careful analysis of all relevant facts and circumstances as seen through the eyes of a reasonable person, as well as an analysis of whether any legitimate purpose would be served by disqualification.[302] Given the extreme nature of disqualification, the appearance of impropriety must have a reasonable basis in fact.[303] The magistrate's appearance of impropriety analysis lacked any factual foundation.[304] Therefore, the disqualification order had to be reversed on this basis as well.

Finally, the court balanced the hardship that the magistrate's order caused. Even if there was an actual conflict of interest the defendants argued that the hardship to them substantially outweighed any hardship to Essex.[305] They further argued that the disqualification of all defense counsel would have a chilling effect on the formation of joint defense groups without serving any legitimate purpose.[306] Essex, in turn, argued that the threat to the legal profession posed by defense counsel's continued representation far outweighed any hardship to the defendants.[307] The Magistrate did not address the relative hardships posed by defense counsel's disqualification.[308] The *Essex Chemical* court thus reversed the disqualification order on this basis.[309] After reversing the disqualification order, the court remanded the matter to the Magistrate. The court directed the Magistrate to conduct a hearing to ascertain the material facts surrounding Skadden's participation in the joint defense group and to determine whether, or to what extent, Skadden shared Essex's confidential information with other defendants.[310]

2. Drafting Joint Defense Agreements

Although joint defense agreements need not be written,[311] the lack

301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.* at 254.
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.* at 255.
310. *Id.*
311. *See* RESTATEMENT, *supra* note 24, at § 76(1) (imposing no writing requirement in common interest arrangements); *see also In re* Skiles, 102 S.W.3d 323, 326 (Tex. App. 2003) (observing that Texas statutory joint defense privilege does not require a written agreement).

of a written agreement can lead to potentially disastrous confusion.[312] In *United States v. Weissman*,[313] for example, the defendant could not meet his burden to demonstrate that a joint defense agreement existed where there was no written agreement and the attorneys involved could not agree on whether an agreement had been reached at a key meeting.[314] The defendant's revelations at that meeting were thus held admissible in his criminal trial, leading to his conviction.[315] As the *Weissman* court observed, "[s]ome form of joint strategy is necessary to establish a [joint defense agreement], rather than merely the impression of one side."[316]

All joint defense agreements should be written and should include certain essential provisions. First, the agreement should specify that all defense counsel have completed conflict of interest checks and know of no conflicts with the plaintiff. Second, the agreement should state that each law firm represents only its client and that each party will look only to its attorneys for advice. This is important because the existence of an attorney-client relationship is a question of fact,[317] and all defense group members should want to prevent an attorney-client relationship from being implied between them.[318] This is also important because the existence of an attorney-client relationship sometimes turns on the subjective belief of the prospective client,[319] and it is unreasonable for a group member to believe that it shares an attorney-client relationship with another party's counsel in the face of an express provision to the contrary. Third, the agreement should not provide for the engagement or payment of common counsel, and the joint defense group should not engage common counsel, because the use of common counsel risks creating an attorney-client relationship where one would not otherwise exist.[320] Fourth, the agreement should provide (1) that confidential

312. *See, e.g.*, Denney v. Jenkens & Gilchrist, No. 03 Civ.5460 SAS, 2004 WL 2712200, at **5-6 (S.D.N.Y. Nov. 23, 2004) (finding waiver where one party denied existence of joint defense strategy).

313. 195 F.3d 96 (2d Cir. 1999).

314. *Id.* at 99-100.

315. *See id.* at 98-100.

316. *Id.* at 100.

317. Stender v. Vincent, 992 P.2d 50, 58 (Haw. 2000); Bd. of Overseers of the Bar v. Mangan, 763 A.2d 1189, 1192-93 (Me. 2001); Attorney Grievance Comm'n v. Shaw, 732 A.2d 876, 883 (Md. 1999); Gramling v. Mem'l Blood Ctrs. of Minn., 601 N.W.2d 457, 459 (Minn. Ct. App. 1999); *In re* Disciplinary Action Against Giese, 662 N.W.2d 250, 255 (N.D. 2003); DiLuglio v. Providence Auto Body, Inc., 755 A.2d 757, 766 (R.I. 2000).

318. *See* United States v. Henke, 222 F.3d 633, 637 (9th Cir. 2000) (stating that "[a] joint defense agreement establishes an implied attorney-client relationship with the co-defendant").

319. State v. Fodor, 880 P.2d 662, 668 (Ariz. Ct. App. 1994); *In re* Jackson, 842 So. 2d 359, 362 (La. 2003); *In re Disciplinary Action Against Giese*, 662 N.W.2d at 255.

320. *See, e.g.*, City of Kalamazoo v. Mich. Disposal Serv. Corp., 125 F. Supp. 2d 219,

information will not be revealed to third-parties or used outside the case absent the consent of all group members, (2) that information sharing between group members does not waive privilege or work product protections with respect to third-parties, and (3) that a waiver by one defense group member will not bind other group members. Fifth, the agreement must state that the defendants have a common interest in the defense of the lawsuit, with the agreement being intended to further that interest. Sixth, the agreement should state that the parties agree to share confidential information only in the subject case, and only pursuant to the agreement's terms. Seventh, the agreement should provide for group members' withdrawals, settlements, or dismissals from the case. Finally, the parties themselves should sign the agreement.

B. Common Interest Arrangements in Business Transactions Where Litigation is Anticipated

Parties may enter into business transactions that affect the interests or rights of others. Sometimes these transactions require the parties to share information that they do not want to share with competitors or interested parties who may later challenge their deal in adversary proceedings. The issue is whether parties to a transaction can enter into a common interest arrangement, long before they are actually sued by a third party, that allows them to exchange privileged information without fear of waiver. This was the issue in a California case, *OXY Resources California LLC v. Superior Court.*[321]

In *OXY Resources,* OXY Resources California LLC and EOG Resources, Inc., entered into a complex transaction in which they exchanged interests in a number of oil and gas producing properties, including property subject to a preferential purchase right held by Calpine Natural Gas LP.[322] Roughly six weeks before finalizing their transaction, EOG and OXY entered into a joint defense agreement.[323] The agreement recited that the parties intended to exchange certain assets; that they anticipated that the past and future ownership and operation of those assets would present various factual and legal issues common to them; that as "anticipated potential defendants" they would share a common interest in defending claims by thirdparties; that they might wish to make joint efforts in preparing any defense to anticipated actions or proceedings; that the documents and information exchanged in the transaction, and associated communications, were privileged,

231-38 (W.D. Mich. 2000).

321. 9 Cal. Rptr. 3d 621, 626-27 (Cal. Ct. App. 2004).

322. *Id.* at 627.

323. *Id.* at 628.

immune, and otherwise exempt from discovery; and that no sharing of information between them would be deemed to waive any otherwise applicable privilege or exemption from disclosure.[324]

EOG and OXY publicly announced their transaction several days after it was completed. Calpine later sued them on a variety of theories, all related to the alleged deprivation of its preferential purchase right.[325]

During discovery, Calpine sought the production of 202 documents from EOG and OXY; 30 of the documents were pre-acquisition communications, while the remaining documents were prepared after EOG and OXY completed their deal. EOG and OXY sought to shield all of the documents from discovery under their joint defense agreement.[326] Moving to compel production of the documents, Calpine argued that there is no joint defense privilege in California, that EOG and OXY could not retroactively invoke their joint defendant status to shield communications made long before the action was filed, and that they waived any privilege by disclosing communications "to an adverse party on the opposite side of a business transaction."[327] The trial court granted Calpine's motion to compel discovery as to the post-acquisition documents, but denied it with respect to the pre-acquisition documents.[328] Both OXY and Calpine petitioned for writs of mandamus.[329]

At the outset, the *OXY Resources* court noted that it was not free to create a new privilege; it could apply only those privileges created by California statutes.[330] Rejecting OXY's characterization of its claimed "joint defense privilege" or "common interest privilege" as an extension of the attorney-client privilege,[331] the *OXY Resources* court determined that "the common interest doctrine is more appropriately characterized under California law as a non-waiver doctrine, analyzed under standard waiver principles applicable to the attorney-client privilege and the work product doctrine."[332] The court thus examined the litigants' specific claims in light of these standard waiver principles, which it described this way:

> Applying . . . waiver principles in the context of communications among parties with common interests, it is essential that participants

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324. *Id.* at 628-29.
325. *Id.* at 629.
326. *See id.* at 630.
327. *Id.*
328. *Id.* at 631.
329. *Id.* at 632.
330. *Id.* at 634.
331. *Id.* at 635.
332. *Id.* (footnote omitted).

> in an exchange have a reasonable expectation that information disclosed will remain confidential. If a disclosing party does not have a reasonable expectation that a third party will preserve the confidentiality of the information, then any applicable privileges are waived. An expectation of confidentiality, however, is not enough to avoid waiver. In addition, disclosure of the information must be reasonably necessary for the accomplishment of the purpose for which the lawyer was consulted. Thus, "[f]or the common interest doctrine to attach, most courts seem to insist that the two parties have in common an interest in securing legal advice related to the same matter—and that the communications be made to advance their shared interest in securing legal advice on that common matter."[333]

Calpine colorfully alleged that EOG's and OXY's joint defense agreement was void as against public policy because it was "a premeditated and intentional plan to shield conspiratorial communications involving a transaction that directly and adversely affected [its] contractual rights."[334] Though recognizing that there is a potential for abuse when parties rely on common interest arrangements to protect pre-lawsuit communications, the *OXY Resources* court explained that this concern did not render the agreement void, because the agreement could not shield non-privileged communications from disclosure.[335] Again, the common interest doctrine requires a valid underlying claim of privilege.[336] Thus, the court held that the trial court abused its discretion in denying Calpine's motion to compel the production of thirteen documents withheld from it solely on the basis of the joint defense agreement.[337]

Turning next to the common interest doctrine generally, the court noted that the non-waiver principles expressed in the California Evidence Code were not limited in application to communications disclosed to others during litigation.[338] For example, section 912 of the California Evidence Code provides: "A disclosure in confidence of a communication that is protected by [the attorney-client privilege] . . . when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted, is not a waiver of the privilege."[339] Furthermore, "[t]he need to [share] privileged information may arise in the negotiation of . . . commercial transaction[s]."[340] By

333. *Id.* at 636-37 (citations omitted).
334. *Id.* at 638 (quoting Calpine's brief).
335. *Id.*
336. *Id.* at 639.
337. *Id.* at 638-39.
338. *Id.* at 642.
339. *Id.* at 635-36 (citations and footnote omitted).
340. *Id.* at 642.

refusing to find a waiver where parties share privileged information in commercial transactions, courts can create an environment in which businesses deal more openly with one another, promoting commerce generally.[341]

Having determined that the common interest doctrine protects privileged communications where litigation is not imminent, the *OXY Resources* court held that the trial court abused its discretion in denying Calpine's motion to compel the production of the pre-acquisition documents and in granting that motion as to post-acquisition documents. In short, the trial court's findings in both respects rested on an inadequate evidentiary foundation.[342]

OXY Resources is a very practical decision. Businesses often need to share otherwise privileged or confidential information in order to make reasonable acquisition, merger, and sale decisions; they should not have to enter into transactions with the fear that sharing such information with their deal partners will expose them. Furthermore, "[t]he common interest doctrine does not require existing or impending litigation."[343] Before seizing upon the *OXY Resources* holding to enter into similar arrangements, however, lawyers should keep at least two things in mind. First, *OXY Resources* turned on the language of key sections of the California Evidence Code. The attorney-client privilege has been widely codified, and other states may have very different statutes or evidence rules.

Second, in *OXY Resources*, OXY and EOG could be virtually certain of litigation with Calpine by virtue of Calpine's contractual right of first refusal in the disputed property.[344] What if the likelihood of litigation is not so clear? In some jurisdictions the abstract possibility of litigation may not implicate the common interest doctrine. Even those courts that recognize common interest arrangements prepared for *potential* litigation require "a palpable threat of litigation at the time of the communication, rather than a mere awareness that . . . questionable conduct may some day result in litigation. . . ."[345]

For attorneys drafting documents memorializing common interest arrangements in connection with transactions, many of the principles that apply to preparing joint defense agreements once litigation is underway apply. The chance of future litigation should be phrased as a strong

341. *See id.* (quoting Hewlett-Packard Co. v. Bausch & Lomb Inc., 115 F.R.D. 308, 311 (N.D. Cal. 1987)).

342. *Id.* at 642-44.

343. Black v. S.W. Water Conservation Dist., 74 P.3d 462, 469 (Colo. Ct. App. 2003).

344. *See OXY Resources*, 9 Cal. Rptr. 3d at 627.

345. *In re* Santa Fe Int'l Corp., 272 F.3d 705, 711 (5th Cir. 2001).

possibility. If likely litigants can be identified at the time the agreement is drafted, they should be identified, and the reasons for their expected adversity should be described.

VII. Recent Developments in Inadvertent Waiver

All experienced lawyers can recall cases in which a party inadvertently revealed confidential information to an adversary or a third party. For revealing parties and their lawyers, such disclosures can pose serious problems. Of course, the lawyers who receive the inadvertently disclosed materials have their own problem—what are they to do with the materials that have come into their hands?

There is no consensus among jurisdictions as to whether the inadvertent disclosure of privileged materials waives any protection that would otherwise attach.[346] Courts confronted with inadvertent disclosures typically take one of three approaches to determining whether the disclosure waives the attorney-client privilege or work product immunity.[347] These approaches apply to any type of inadvertent disclosure.[348]

Under the "lenient approach," the privilege must be knowingly waived, and the determination of inadvertence ends the analysis.[349] Under the "strict approach," any document produced, whether inadvertently or otherwise, loses its privileged status upon production.[350] Finally, there is the "middle," "moderate," or "modern" approach, which requires courts to make waiver determinations on a case-by-case basis.[351] Courts applying this approach consider (1) the reasonableness of the precautions taken to avoid inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) whether the overriding interests of fairness and justice are served by absolving the party of its error.[352] The first factor typically

346. Save Sunset Beach Coal. v. City of Honolulu, 78 P.3d 1, 21 (Haw. 2003).

347. *See* Elkton Care Ctr. Assocs. Ltd. P'ship v. Quality Care Mgmt., Inc., 805 A.2d 1177, 1183 (Md. Ct. Spec. App. 2002) (asserting that in inadvertent waiver cases, any distinction between attorney-client privilege and work product immunity disappears) (quoting Hartford Fire Ins. v. Garvey, 109 F.R.D. 323, 328 (N.D. Cal. 1985)).

348. *See, e.g.*, United States v. Rigas, 281 F. Supp. 2d 733 (S.D.N.Y. 2003) (applying the "middle" or "moderate" approach to inadvertent disclosure of information on computer hard drives).

349. Harp v. King, 835 A.2d 953, 966 (Conn. 2003) (quoting Gray v. Bicknell, 86 F.3d 1472, 1483-84 (8th Cir. 1996)).

350. *See id.* (quoting *Gray* and referring to this approach as the "strict test").

351. *Save Sunset Beach Coal.*, 78 P.3d at 22-23; *Elkton Care Ctr.*, 805 A.2d at 1184.

352. Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) (involving documents produced by defendant in lieu of answering an interrogatory).

is the most critical,[353] although all of the factors are important and must be considered.[354] This approach reflects the majority rule.[355]

A. Recent Cases and Controversies

Not all inadvertent disclosures of confidential information involve documents. *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.*,[356] illustrates the danger of carelessness when using the telephone.

In that case, Marvell was negotiating with Jasmine to purchase a portion of Jasmine's semiconductor business and to employ a group of Jasmine's engineers. Three Marvell executives, including its general counsel and an in-house patent attorney, used a speakerphone to call a senior Jasmine executive.[357] The executive was out, and they got her voicemail. After leaving a message, they continued to talk among themselves, not realizing that they failed to hang up their speakerphone.[358] Their conversation revealed that Marvell's real intention was not to purchase anything, but rather to steal Jasmine's technology and to pirate away Jasmine personnel using purloined information about their compensation and stock options.[359] The Jasmine executive checked her voicemail and heard the entire conversation. The conversation caused Jasmine to further investigate the intended transaction, upon which it discovered more misconduct by Marvell.[360] Jasmine then sued Marvell for trade secret misappropriation.[361]

Marvell moved for a preliminary injunction, seeking to enjoin Jasmine from using the recorded conversation. Marvell argued that because the conversation involved its attorneys, its contents were protected by the attorney-client privilege.[362] Jasmine argued that Marvell had waived its privilege by disclosing the information in the voicemail message, and that the conversation fell within the crime-fraud exception to the privilege.[363] The trial court granted Marvell's motion for a preliminary injunction, concluding that the contents of the conversation were privileged, and furthermore, that Marvell had not waived the

353. *See id.* (focusing on this factor).
354. *See Harp*, 835 A.2d at 969-70 (applying and discussing all five factors); *Elkton Care Ctr.*, 805 A.2d at 1185 (same).
355. Alldread v. City of Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993).
356. 12 Cal. Rptr. 3d 123 (Cal. Ct. App. 2004), *review granted*, 94 P.3d 475 (Cal. 2004).
357. *Id.* at 125.
358. *Id.*
359. *Id.* at 125-26.
360. *Id.* at 126.
361. *Id.*
362. *Id.*
363. *Id.* at 124.

privilege because it did not intend to disclose the contents of the conversation.[364]

The appellate court determined that the trial court erred when it found that Marvell had not waived the privilege. Under California law, an "intent to disclose is not required in order for the holder to waive the privilege through uncoerced disclosure."[365] Although it is true in California "that an attorney's inadvertent disclosure does not waive the privilege absent the privilege holder's intent to waive,"[366] here a non-lawyer executive participated in the call and Marvell's general counsel additionally had purely business responsibilities.[367] Accordingly, California's inadvertent waiver rules, which might have saved Marvell had only its lawyers been involved, did not apply.[368] Additionally, the crime-fraud exception stripped the conversation of its privilege in any event.[369]

The California Supreme Court has granted review in *Jasmine,* depriving the case of precedential force.[370] Even so, *Jasmine* is valuable because it demonstrates that technology is not always a lawyer's friend. Speakerphones may transmit background conversations that participants do not intend to share with others outside their office. "Mute" buttons on telephones may not work. The camera and microphone on videoconference equipment may be working when the lawyers in the room think they are off. There is ample opportunity for error in electronic communication, and equal need for caution.

Although inadvertent waiver would appear to be of greatest concern to the party alleged to have waived its privilege, lawyers receiving privileged materials as a result of adversaries' inadvertence must mind their own ethical obligations. In Formal Opinion 92-368, the American Bar Association's Standing Committee on Ethics and Professional Responsibility opined that a lawyer:

> [W]ho receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them.[371]

364. *Id.* at 126-27.
365. *Id.* at 128.
366. *Id.*
367. *Id.* at 128-29.
368. *See id.* at 128.
369. *Id.* at 132.
370. Jasmine Networks v. Marvell Semiconductor, 94 P.3d 475 (Cal. 2004).
371. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-368, at 1 (1992).

In *Holland v. Gordy Co.*,[372] a Michigan court went so far as to state that the position expressed in Formal Opinion 92-368 binds ABA members.[373] The court in *Resolution Trust Corp. v. First of America Bank*[374] reached the same conclusion nearly a decade earlier, while also suggesting the converse—that lawyers who are not ABA members are not bound by the opinion.[375]

The suggestion that ABA ethics opinions bind ABA members is nonsense. Lawyers are bound by the ethics rules of the states in which they practice, as well as by rules of conduct adopted by courts and regulatory authorities before which they appear. If lawyers are bound by the positions expressed in ABA ethics opinions, are they also bound to accept or adopt all other positions taken by the ABA? More fundamentally, it makes no sense to have one set of ethical duties for ABA members and another set for lawyers who do not belong to the ABA, especially since ABA membership is not mandatory.

The ABA retreated from Formal Opinion 92-368 when it created Rule 4.4(b) in 2002.[376] Model Rule 4.4(b) provides: "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."[377] Whether a lawyer who receives a misdirected document is required to take additional steps, such as returning the document to the sender, is beyond the scope of the Model Rules.[378] If the law in a particular jurisdiction does not require a lawyer to return a document inadvertently sent to her, "the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer."[379]

The Association of the Bar of the City of New York's Committee on Professional and Judicial Ethics (the "New York Committee") analyzed a lawyer's obligations upon receiving a communication containing confidences or secrets that is not intended for him in an April 2004 opinion.[380] The New York Committee determined that:

372. Nos. 231183, 231184, 231185, 2003 WL 1985800 (Mich. Ct. App. Apr. 29, 2003).

373. *Id.* at *10 n.20.

374. 868 F. Supp. 217 (W.D. Mich. 1994).

375. *Id.* at 221 ("The ABA's interpretations [in Formal Op. 92-368] are binding *only on* ABA members.") (emphasis added).

376. *See* THE 2002 CHANGES, *supra* note 269, at 83-84 (showing addition of paragraph (b) and new comments to Model Rule 4.4).

377. MODEL RULES, *supra* note 97, at R. 4.4(b).

378. *Id.* cmt. 2.

379. *Id.* cmt. 3.

380. Ass'n of the Bar of the City of N.Y., Comm. on Prof'l & Judicial Ethics, Formal Op. No. 2003-04 (Apr. 9, 2004).

> [A] lawyer receiving a misdirected communication containing confidences or secrets (1) has obligations to promptly notify the sending attorney, to refrain from review of the communication, and to return or destroy the communication if so requested, but, (2) in limited circumstances, may submit the communication for in camera review by a tribunal, and (3) is not ethically barred from using information gleaned prior to knowing or having reason to know that the communication contains confidences or secrets not intended for the receiving lawyer. However, it is essential as an ethical matter that the receiving attorney promptly notify the sending attorney of the disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary.[381]

The New York Committee concluded that a lawyer who receives a misdirected communication may retain the communication for the sole purpose of submitting it to a tribunal for in camera review if:

> [T]he lawyer (1) promptly notifies the sending lawyer about the mistaken transmission, and, if requested, provides a copy to the sending lawyer, (2) believes in good faith, and in good faith anticipates arguing to the tribunal, that the inadvertent disclosure has waived the attorney-client or other applicable privilege or that the communication may not appropriately be withheld from production for any other reason, and (3) reasonably believes disclosing the communication to the tribunal is relevant to the argument that privilege has been waived or otherwise does not apply.[382]

This limited permitted use does not apply, however, if the sender notifies the receiving attorney of the inadvertent disclosure and demands the documents' return before the receiving attorney actually gets them.[383] In that case there has effectively been no disclosure.[384]

A harder question arises where the receiving attorney reviews a communication before realizing that he is not the intended recipient. Suppose, for example, an attorney receives a one page facsimile transmission containing the other side's confidential information. It is not reasonable to expect that lawyer to purge the information from his mind, or to be able to litigate or negotiate further as though he has never seen it.[385] To disqualify, sanction, or professionally discipline the receiving lawyer in that situation would be unfair to the lawyer and to the

381. *Id.* at *1.
382. *Id.* at *8.
383. *Id.*
384. *Id.*
385. *Id.*

client.[386]

B. *An Odd Twist: Voluntary but Mistaken Disclosure of Privileged Documents*

It is generally accepted that the attorney-client privilege belongs to, or is held by, the client. It is also generally accepted that a lawyer may voluntarily waive the privilege for the client.[387] But, it is not always the case that an apparently voluntary waiver by a lawyer binds the client, as illustrated by a recent Wisconsin case, *Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust.* [388]

In *Harold Sampson,* one of the plaintiffs, Beth Bauer, prepared a number of documents related to her views on litigation strategy and associated issues for her attorney's use. The plaintiffs' attorney at the time, Robert Elliott, believed that the documents were not privileged and turned them over to defense counsel in response to a discovery request.[389] Elliott was replaced as counsel several months later for unrelated reasons, and the plaintiffs' new counsel soon determined that privileged documents had been produced. The plaintiffs' new lawyers requested that the defendants' lawyers return the documents, but defense counsel refused.[390]

It was undisputed that the documents were privileged, that the plaintiffs had authorized Elliott to disclose all non-privileged documents during discovery, and that the documents were produced without the plaintiffs' knowledge or consent.[391] The question was whether:

> [A] lawyer's voluntary production of documents in response to opposing counsel's discovery request constitutes a waiver of the attorney-client privilege under [a Wisconsin statute] when the lawyer does not recognize that the documents are subject to the attorney-client privilege and the documents are produced without the consent or knowledge of the client.[392]

The trial court answered this question "no," but the Wisconsin Court of Appeals answered it "yes" and the case then made its way to the Wisconsin Supreme Court.[393]

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386. *See id.* ("To put the attorney at ethical risk for using information that cannot be suppressed from knowledge potentially would penalize the innocent receiving attorney and their [sic] client for the error of another.").

387. EPSTEIN, *supra* note 40, at 270-71.

388. 679 N.W.2d 794 (Wis. 2004).

389. *Id.* at 796.

390. *Id.*

391. *Id.*

392. *Id.* at 795 (footnote omitted).

393. *Id.*

The Wisconsin statute on which the dispute turned provides, in pertinent part:

> A person upon whom this chapter confers a privilege against disclosure of the confidential matter or communication waives the privilege if the person or his or her predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the matter or communication.[394]

Another Wisconsin statute provides that the attorney-client privilege belongs to the client, and that the client may refuse to disclose, and prevent another person from disclosing, confidential communications.[395] The Wisconsin Supreme Court, in holding that only a client can waive the attorney-client privilege, concluded that Elliott did not waive his clients' privilege by producing the documents.[396]

The court of appeals had reasoned that because the clients delegated discovery to Elliott, and because an attorney is a client's agent, Elliott's voluntary production of the documents waived the attorney-client privilege.[397] The supreme court rejected this approach.[398] In an earlier case in which the supreme court had applied agency theory to impute an attorney's conduct to his client, equity supported penalizing the client for the attorney's misconduct; more particularly, penalizing the client in that case would motivate clients to police disruptive attorneys, thus improving the justice system.[399] In *Harold Sampson,* the clients were already motivated to prevent the release of their privileged documents, and protecting the attorney-client privilege promotes the functioning of the justice system.[400]

The defendants countered that recognizing a waiver would promote quality legal representation and would foster the proper functioning of the judicial system by holding counsel to a reasonable standard of care in handling privileged information.[401] The court disagreed, reasoning that it would be placing too great a burden on the attorney-client relationship if it were to recognize a waiver on the facts at hand.[402] As the court explained:

> The purpose of the attorney-client privilege is to promote "full and frank communication" between client and attorney. Full and frank

394. *Id.* at 799 (quoting WIS. STAT. § 905.11).
395. *Id.* at 798 (quoting WIS. STAT. § 905.03(2)).
396. *Id.* at 796.
397. *Id.* at 800.
398. *See id.* at 801.
399. *Id.* at 802.
400. *Id.*
401. *Id.*
402. *Id.*

> communication is in turn promoted by endowing the communication with confidentiality. If the privilege did not exist, "everyone would be thrown upon his own legal resources." Deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counselor half his case. Attorney-client communication is promoted when a client may give documents to an attorney that further the representation without fearing that the attorney will release the documents to an adversary who will use the documents against the client. Clients aware that an attorney's disclosure waives the privilege may keep critical information from their attorney, thus thwarting the policy of free flow of information that lies behind the attorney-client privilege. One way to encourage a client to communicate fully with his or her attorney is to hold that only the client should be able to waive the attorney-client privilege.[403]

The defendants also argued that the purpose of a trial is to find the truth, and that a finding of waiver would help reveal the truth and thus promote justice.[404] While acknowledging the defendants' point, the court reasoned that the preservation of confidentiality in attorney-client communications better promotes the smooth functioning of the judicial system.[405]

Harold Sampson is a strange and flawed decision. Although the Wisconsin Supreme Court stated that the case was not an inadvertent disclosure case, such that the inadvertent disclosure rules adopted by other jurisdictions did not apply,[406] the court treated it as such, and essentially applied the "lenient approach" to inadvertent disclosures.

The court's attempt to distinguish inadvertent disclosure cases was weak. Specifically, the court reasoned that it was not presented with an inadvertent disclosure because "[t]he only mistake seems to have been the attorney's conclusion that the documents were not privileged."[407] But that is also "the only mistake" that lawyers make in cases where, for example, they inadvertently include privileged documents among non-privileged ones in a document production. The *Harold Sampson* court should have branded the case one of inadvertent disclosure and then applied the lenient approach to determine whether Elliott's disclosure of the plaintiffs' documents waived the attorney-client privilege. Because the lenient approach holds that the privilege must be knowingly waived, the result would have been the same. That course would have allowed

403. *Id.* at 802-03 (footnotes omitted).
404. *Id.* at 803.
405. *Id.*
406. *Id.* at 799.
407. *Id.* at 799-800.

the court to logically avoid established agency law to reach its desired result instead of simply casting aside that law for no good reason.

With respect to agency law, there is much the *Harold Sampson* court ignored. The attorney-client relationship is an agency relationship.[408] An agent is presumed to be acting within the scope of his authority where his actions are legal and the third-party with whom he is dealing has no notice of the agent's limitations.[409] Where an agent has apparent authority to act for a principal, the principal is bound by the agent's unauthorized acts on his behalf.[410] An agent's apparent authority arises from the principal's manifestation of authority to a third-party, not from the principal's manifestation to the agent.[411]

Applying these basic agency principles to the facts of *Harold Sampson,* Elliott was the plaintiffs' agent, he presumably was acting within the scope of his authority when he produced the documents at issue, and he had apparent authority to produce the documents. Accordingly, he waived the plaintiffs' privilege. And, although it is true that Elliott could not have effected a waiver if the defendants knew or should have known that he did not have authority to produce the documents,[412] there was no way for them to know that. They could not have ethically communicated with the plaintiffs to determine the scope of Elliott's authority.[413] It cannot be argued that the defendants should have known that Elliott was acting outside the scope of his authority simply because he produced privileged documents; clients and lawyers sometimes produce documents that are privileged or that might otherwise enjoy work product immunity when they think that doing so serves important strategic goals.[414]

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408. Rosenauer v. Scherer, 105 Cal. Rptr. 2d 674, 690 (Cal. Ct. App. 2001); Seaboard Sur. Co. v. Boney, 761 A.2d 985, 989, 992 (Md. Ct. Spec. App. 2000); Multilist Serv. of Cape Girardeau, Mo., Inc. v. Wilson, 14 S.W.3d 110, 114 (Mo. Ct. App. 2000); Crane Creek Ranch, Inc. v. Cresap, 103 P.3d 535, 537 (Mont. 2004); Daniel v. Moore, 596 S.E.2d 465, 469 (N.C. Ct. App. 2004) (quoting case); State *ex rel.* Okla. Bar Ass'n v. Taylor, 4 P.3d 1242, 1253 n.39 (Okla. 2000); DiLuglio v. Providence Auto Body, Inc., 755 A.2d 757, 766 (R.I. 2000) (quoting case); Hill & Griffith Co. v. Bryant, 139 S.W.3d 688, 696 (Tex. App. 2004).

409. WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP 185 (3d ed. 2001).

410. *Id.* at 182.

411. RESTATEMENT (SECOND) OF AGENCY § 8 (1958).

412. GREGORY, *supra* note 409, at 184.

413. *See* MODEL RULES, *supra* note 97, at R. 4.2 (governing communications with persons represented by counsel); MODEL CODE, *supra* note 98, at DR 7-104(A)(1) (same).

414. The defendants would have been justified in assuming that Elliott knew what he was doing when he produced the documents. Elliott was "a 'prominent, experienced, competent, well-respected board certified civil trial lawyer, who [was] known to have handled many difficult[,] complex and high-profile civil lawsuits.'" Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust, 679 N.W.2d 794, 797 (Wis. 2004)

The Wisconsin Supreme Court acknowledged that under agency law principles a litigant ordinarily is bound by its lawyer's acts,[415] but it simply declared that law to be undesirable in this situation.[416] The chief problem with picking and choosing when to apply settled law—instead of approaching a problem in a way that respects that law, such as taking the lenient approach to inadvertent waiver—is that it yields horribly uncertain results. Furthermore, what appears to be result-oriented reasoning diminishes public confidence in courts. Because it is the rule everywhere that the attorney-client privilege is held by the client rather than by the lawyer, litigants may be tempted to rely on *Harold Sampson* in efforts to defeat waiver allegations. For the reasons expressed here, they should not.

VIII. The Transmission and Receipt of Invisible Information

Documents created with word processing software contain "metadata."[417] Metadata is information embedded in a document's electronic file that is automatically created by the software the author is using without the author's intent or knowledge.[418] It is, quite simply, "data about data."[419] Metadata may include the author's name, the names of prior authors, the identity of the server or hard disk where the document is saved, file properties and summary information, document revisions and versions, template information, the names of people to whom the document has been sent, comments, the time spent editing the document, custom document properties, and more.[420] "Metadata can be as revealing as a postmark on a letter, fingerprints on the envelope, and DNA from saliva on the seal."[421] Furthermore, because lawyers often reuse documents and templates, the amount of metadata that a document contains is often impossible to judge.[422]

Many lawyers know that documents transmitted electronically contain metadata. One lawyer has even boasted publicly that "[t]he first

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(quoting discovery referee).

415. *Id.* at 801.

416. *Id.* at 802.

417. David Hricik & Robert R. Jueneman, *The Transmission and Receipt of Invisible Confidential Information*, PROF. LAW., Spring 2004, at 18, 18; Jason Krause, *Hidden Agendas*, ABA J., July 2004, at 26, 26; Donna Payne & Bruce Lewis, *What You Can't See, Can Hurt You*, LEGAL TIMES, Sept. 27, 2004, at 16, 16; Thomas E. Spahn, *Litigation Ethics in the Modern Age*, BRIEF, Winter 2004, at 12, 16.

418. Hill & Johnson, *supra* note 13, at 102.

419. Spahn, *supra* note 417, at 16.

420. Hricik & Jueneman, *supra* note 417, at 18; Krause, *supra* note 417, at 27; Payne & Lewis, *supra* note 417, at 16.

421. Krause, *supra* note 417, at 26.

422. *Id.*

thing I do when I get something is look for [metadata] like the author's name, revisions, and history."[423] The problem, quite obviously, is the associated transmission of confidential information.[424]

Given lawyers' ethical obligation to maintain clients' confidences, they should exercise reasonable care to strip metadata from documents exchanged with adversaries, electronically filed with courts, or disclosed to the public.[425] Alternatively, lawyers might transmit documents in electronic formats that do not allow metadata to be revealed.[426] The easiest solution, of course, is simply to send paper copies of documents.

Since the threat to client confidentiality and attorney work product posed by metadata is now known, it is appropriate to focus on the lawyers who receive electronic documents loaded with invisible information. Do they have any ethical obligations with respect to the metadata hidden in the documents sent to them? On the one hand, it might be reasonably argued that lawyers' duty to competently represent their clients obligates them to uncover the metadata in the documents they receive and, if possible, use any information revealed to their clients' advantage.[427] On the other hand, it can just as easily be argued that electronically ransacking a document to uncover metadata is dishonest—it is no different than rummaging through another lawyer's briefcase when he leaves the room, or eavesdropping on another lawyer's private conversation with her client.

The New York State Bar Association's Committee on Professional Ethics attempted to resolve this debate in a 2001 ethics opinion.[428] The Committee saw no difference between a lawyer's surreptitious examination of metadata and "less technologically sophisticated means of invading the attorney-client relationship" that have been "rejected as inconsistent with the ethical norms of the profession."[429] The Committee concluded that a lawyer's surreptitious use of technology to obtain another party's potentially confidential information would violate New York's ethics rules prohibiting conduct involving dishonesty, deceit, fraud or misrepresentation, as well as conduct prejudicial to the

423. *Id.* (quoting lawyer).

424. *See id.* (describing confidential information learned from an examination of metadata found in a document from a major intellectual property lawsuit).

425. Hricik & Jueneman, *supra* note 417, at 18.

426. *Id.* at 18-19 (describing how this can be accomplished).

427. MODEL RULES, *supra* note 97, at R. 1.1 ("A lawyer shall provide competent representation to a client."); MODEL CODE, *supra* note 98, at EC 6-1 ("Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients.").

428. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. No. 749, 2001 WL 1890308 (Dec. 14, 2001).

429. *Id.* at *2.

administration of justice.[430]

Because a lawyer intends another party to see the text of the document being transmitted, but does not intend the other party to see the invisible information embedded in it, it is tempting to analyze the transmission and receipt of confidential information in the form of metadata under any of the rules governing the inadvertent disclosure of privileged information.[431] Under the moderate approach to inadvertent disclosure, for example, a court would need to look at the precautions against disclosure taken by the transmitting attorney, such as whether she "scrubbed" the document before sending it, or whether she had the ability to transmit the document in an electronic form that does not lend itself to technological analysis by the recipient.[432]

There are two problems with an inadvertent waiver approach to metadata transmission and retrieval. First, metadata cannot be easily removed from documents; scrubbing software is not foolproof.[433] This fact undermines the argument that a lawyer who electronically transmits a document to a third party knowingly shares with that party any metadata in the document. Second, a transmitting lawyer may never know that her adversary is retrieving metadata from her documents, thus she does not know to take remedial steps that a court might consider important in an inadvertent waiver analysis.[434]

The issues raised here are not easily resolved. Lawyers who transmit documents electronically need to exercise reasonable care to avoid revealing clients' confidential information in metadata.[435] On the other hand, lawyers who are inclined to search documents they receive for metadata do so at the risk that their conduct will be declared dishonest or prejudicial to the administration of justice. In litigation, there is the risk that electronic snooping may lead to disqualification. Thus, a trial lawyer who believes that she can gain some advantage by retrieving her adversary's metadata might wish to consider a preemptive motion with the court seeking a declaration that her conduct is permissible. The downside to this approach is that it obviously alerts her adversary to the issue, such that future documents are unlikely to contain meaningful electronic information.

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430. *Id.*

431. *See id.* at *3.

432. *See supra* notes 351-55 and the accompanying text (discussing the "middle," "moderate," or "modern" approach to inadvertent disclosure of confidential information).

433. Hricik & Jueneman, *supra* note 417, at 18.

434. *See id.* at 20 (observing that a lawyer is unlikely to know that an adversary is electronically gathering information about her or her clients).

435. N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 782, 2004 WL 3021157, at *2 (2004).

IX. Insurance, the Duty to Cooperate, and Waiver

Individuals and entities that are sued often turn to their liability insurers for a defense. An insured that seeks a defense from its liability insurer must cooperate with the insurer in that defense. An insured's duty to cooperate is contractual and is imposed by cooperation clauses in standard liability insurance policies.[436] Cooperation clauses typically obligate insureds to provide evidence, to assist the insurer in discovery, to attend depositions and appear in court when requested, to assist the insurer in the prosecution of cross-claims and third-party claims, to help the insurer enforce its subrogation rights, and more.[437] A directors' and officers' liability insurance policy may provide:

> The INSURER shall not be called upon to assume charge of the investigation, settlement or defense of any demand, suit or proceeding, but the INSURER shall have the right and shall be given the opportunity to associate with the DIRECTORS, OFFICERS and COMPANY or any underlying insurer, or both, in the investigation, settlement, defense and control of any demand, suit or proceeding relative to any WRONGFUL ACT where the demand, suit or proceeding involves or may involve the INSURER. *At all times, the DIRECTORS, OFFICERS and COMPANY and the INSURER shall cooperate in the investigation, settlement and defense of such demand, suit or proceeding.*[438]

Insureds' duty to cooperate is very broad and, in many jurisdictions, includes the obligation to provide the insurer with information that it may use to defeat coverage.[439] The issue here is whether the duty is so broad as to operate as a waiver of the insured's attorney-client privilege in coverage litigation with its insurer. *Waste Management, Inc. v. International Surplus Lines Insurance Co.*[440] is a leading case on point.

In *Waste Management,* two insurers sought to discover attorney-client communications between their insureds and the insureds' lawyers in connection with environmental litigation for which the insurers were being asked to indemnify the insureds.[441] The insureds refused to

436. ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW 845 (3d ed. 2002).

437. Douglas R. Richmond, *Liability Insurers' Right to Defend Their Insureds*, 35 CREIGHTON L. REV. 115, 122 (2001).

438. ASSOCIATED ELEC. & GAS INS. SERVS. LTD., DIRECTORS AND OFFICERS LIABILITY INSURANCE POLICY 8 (2002) (emphasis added) (on file with the author).

439. *See, e.g.*, Metlife Auto & Home v. Cunningham, 797 N.E.2d 18, 23 (Mass. App. Ct. 2003) (observing that "the better rule is that the duty to cooperate does include the obligation to provide accurate information bearing on coverage").

440. 579 N.E.2d 322 (Ill. 1991).

441. *See id.* at 324-25.

provide the requested documents on privilege grounds.[442] The insurers contended that the cooperation clauses in the insureds' policies, which obligated the insureds to "give all such information and assistance as the insurers may reasonably require," abrogated the insureds' attorney-client privilege.[443] The Illinois Supreme Court agreed with the insurers, stating:

> Here, the cooperation clause imposes a broad duty of cooperation and is without limitation or qualification. It represents the contractual obligations imposed upon and accepted by insureds at the time they entered into the agreement with insurers. In light of the plain language of the cooperation clause in particular, and language in the policy as a whole, it cannot seriously be contended that insureds would not be required to disclose contents of any communications they had with defense counsel representing them on a claim for which insurers had the ultimate duty to satisfy.
>
> . . . [W]e address one additional point. Insureds maintain that the purpose of the cooperation clause was mooted once the underlying lawsuit was terminated. We disagree. Insureds' duty to cooperate concerning matters covered by the insurance agreement . . . continues for as long as insureds seek to enforce its terms, and certainly to the point when insurers were requested to perform their end of the bargain. The fact that the parties are now adverse concerning the interpretation of such terms does not negate insureds' contractual duty.
>
> A fair reading of the terms of the contract renders any expectation of attorney-client privilege, under these circumstances, unreasonable. We conclude that the element of confidentiality is wanting and, therefore, the attorney-client privilege does not apply to bar discovery of the communications in the underlying lawsuits.[444]

Although a few courts have adopted the *Waste Management* position,[445] or have indicated that they might do so,[446] most courts presented with the issue have rejected the Illinois Supreme Court's reasoning.[447] The courts that have declined to follow *Waste Management*

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442. *Id.* at 325.

443. *Id.* at 327-28 (quoting cooperation clauses in policies).

444. *Id.* at 328.

445. *See, e.g.*, First Fid. Bancorp. v. Nat'l Union Fire Ins. Co., No. CIV.A. 90-1866, 1994 WL 111363, at *7 (E.D. Pa. Mar. 30, 1994).

446. *See, e.g.*, Metlife Auto & Home v. Cunningham, 797 N.E.2d 18, 22-23 (Mass. App. Ct. 2003).

447. *See, e.g.*, Bituminous Cas. Corp. v. Tonka Corp., 140 F.R.D. 381, 386 (D. Minn. 1992); N. River Ins. Co. v. Philadelphia Reinsurance Corp., 797 F. Supp. 363, 368-69

have good reason for doing so. The insured's duty to cooperate "is essentially the flipside of the insurer's duty to defend,"[448] and a solid argument can thus be made that a cooperation clause waives the insured's attorney-client privilege vis-à-vis the insurer only in a case where their interests are aligned in defending the insured against a claim by a third-party.[449] Some insurers concede that the cooperation clause is not intended to waive the insured's attorney-client privilege in litigation with the insurer or in any other situation.[450]

Of course, even in Illinois and other jurisdictions following the *Waste Management* approach, the fact that an insured might refuse to reveal privileged communications, and thus breach its duty to cooperate, does not necessarily mean that it will lose its coverage. This is because in most jurisdictions "the insured's breach of the cooperation clause will not relieve the insurer of its obligations under the policy unless the lack of cooperation is substantial and material."[451] In these jurisdictions, the insurer must prove that it was prejudiced by the insured's failure to cooperate.[452]

Because the reach of the attorney-client privilege generally is an issue of state law, and many states have not considered the effect of cooperation clauses in insurance policies on the attorney-client privilege, this issue is far from settled. A parallel issue is whether an insured that shares privileged information with an insurer that may be its adversary in future coverage litigation waives its privilege with respect to government agencies and other third-parties.[453] These are concerns to which litigants must be sensitive.

X. Receivers, Trustees, Liquidators and Examiners

Businesses fail all the time, mostly without allegations of wrongdoing on the part of their owners, officers, directors, or

(D.N.J. 1992); Pittston Co. v. Allianz Ins. Co., 143 F.R.D. 66, 72 (D.N.J. 1992); Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408, 416-17 (D. Del. 1992); Rockwell Int'l Corp. v. Superior Court, 32 Cal. Rptr. 2d 153, 156-60 (Cal. Ct. App. 1994); Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co., 730 A.2d 51, 63-64 (Conn. 1999); E. Air Lines, Inc. v. United States Aviation Underwriters, Inc., 716 So. 2d 340, 342-43 (Fla. Dist. Ct. App. 1998); Dedham-Westwood Water Dist. v. Nat'l Union Fire Ins. Co., No. CIV.A. 96-00044, 2000 WL 33593142, at *5 (Mass. Super. Ct. Feb. 4, 2000); State v. Hydrite Chem. Co., 582 N.W.2d 411, 420-21 (Wis. Ct. App. 1998).

448. JERRY, *supra* note 436, at 845.

449. *E. Air Lines Inc.*, 716 So. 2d at 343.

450. *Rockwell Int'l Corp.*, 32 Cal. Rptr. 2d at 158.

451. JERRY, *supra* note 436, at 847.

452. Metlife Auto & Home v. Cunningham, 797 N.E.2d 18, 23-24 (Mass. App. Ct. 2003).

453. *See, e.g.*, First Fid. Bancorp. v. Nat'l Union Fire Ins. Co., No. CIV.A. 90-1866, 1994 WL 111363, at *2 (E.D. Pa. Mar. 30, 1994) (discussing this concern).

professional service providers. But that is not always the case. If litigation ensues, assertion and waiver of the failed or failing entity's attorney-client privilege can be an issue. If a business continues under new management charged with turning around its fortunes, the authority to assert and waive the privilege passes with control of the company to the new managers.[454] "Displaced managers may not assert the privilege over the wishes of current managers, even as to statements the former might have made to counsel concerning matters within the scope of their corporate duties."[455] Most disputes arise where a bankruptcy trustee, bankruptcy examiner, liquidator, or receiver is involved and privileged communications made before the bankruptcy, liquidation or receivership are the subject of discovery.

A. Bankruptcy Trustees and Examiners

The mere filing of a bankruptcy petition does not waive the debtor's attorney-client privilege.[456] A bankruptcy trustee's power to waive the privilege depends on whether the debtor is an entity or an individual.[457] In the case of an individual debtor, a trustee's ability to waive the debtor's attorney-client privilege depends on the facts of the particular case. In general:

> The inquiry [of whether a bankruptcy trustee can waive the attorney-client privilege] requires balancing the interests of a full and frank discussion in the attorney-client relationship and the harm to the debtor upon a disclosure with the trustee's duty to maximize the value of the debtor's estate and represent the interests of the estate.[458]

Courts are unlikely to permit the trustee to waive the debtor's attorney-client privilege in cases in which the trustee and the debtor have an adversarial relationship.[459]

Things are more settled where a corporation or partnership is involved. In *Commodity Futures Trading Comm'n v. Weintraub*,[460] the Supreme Court held that the trustee of a bankrupt corporation has the power to waive the corporation's attorney-client privilege with respect to

454. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 349 (1985).

455. *Id.*

456. *In re* Muskogee Envtl. Conservation Co., 221 B.R. 526, 532 (Bankr. N.D.Okla. 1998) (citing Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985)).

457. 2 RICE ET AL., *supra* note 50, § 9:12, at 30.

458. Moore v. Eason (*In re* Bazemore), 216 B.R. 1020, 1023-24 (Bankr. S.D. Ga. 1998); *see also In re* Foster, 188 F.3d 1259, 1265-66 (10th Cir. 1999) (accepting this balancing test).

459. *See, e.g.*, *In re* Miller, 247 B.R. 704, 710-11 (Bankr. N.D. Ohio 2000) (involving alleged bankruptcy fraud by debtor).

460. 471 U.S. 343 (1985).

pre-bankruptcy communications.[461] This is because the trustee of a bankrupt corporation fills the role "most closely analogous to that of a solvent corporation's management."[462] The same principle clearly holds true where the bankrupt entity is a limited partnership,[463] and there is no reason that it should not extend to general partnerships.[464] Any partnership—whether limited or general—is like a corporation in that it can only act through its agents, and the same rules should therefore apply.[465]

Bankruptcy courts may appoint examiners, whose duties typically are more limited than those of trustees.[466] An examiner usually is appointed for the purpose of investigating alleged dishonesty, fraud, incompetence, misconduct or mismanagement of the debtor by its current management, while a trustee has the power to operate the debtor's business.[467] An examiner has a statutory duty to file a report of his investigation and to transmit a copy of that report to any creditors' committees or equity security holders' committees, to any indenture trustees, and to any other entities that the bankruptcy court designates.[468]

A court may, however, empower an examiner to perform managerial functions normally carried out by a trustee.[469] In such a case,

461. *Id.* at 358.

462. *Id.* at 353.

463. United States v. Campbell, 73 F.3d 44, 47 (5th Cir. 1996); Meoli v. Am. Med. Serv. of San Diego, 287 B.R. 808, 815-17 (S.D. Cal. 2003).

464. *See* Hopper v. Frank, 16 F.3d 92, 96 (5th Cir. 1994) (concluding that there is no reason to treat corporations and partnerships differently for purposes of attorney-client relationships); *In re* Bieter Co., 16 F.3d 929, 935 (8th Cir. 1994) (stating that the attorney-client privilege test that it previously adopted, "although expressly applicable to corporations and their employees, is no less instructive as applied to a partnership or some other client entity").

465. *See Campbell,* 73 F.3d at 47 (discussing limited partnerships); Zimmerman v. Dan Kamphausen Co., 971 P.2d 236, 239 (Colo. Ct. App. 1998) (explaining that "[a]s a general rule every partner is an agent of a general partnership for the purpose of carrying on its authorized business"); TEX. REV. CIV. STAT. ANN. art. 6132b, § 301(1) (Vernon 1970 & Cum. Supp. 2004) (stating that a partnership can sue and be sued in its partnership name).

466. *In re* Boileau, 736 F.2d 503, 506 (9th Cir. 1984).

467. *In re* Am. Bulk Transp. Co., 8 B.R. 337, 340 (Bankr. D. Kan. 1980); *see also* 11 U.S.C.A. §§ 1106(a)(3) & (b) (1993) (providing that an examiner shall, except to the extent the court orders otherwise, "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan").

468. 11 U.S.C.A. § 1106(a)(4)(A) & (B) (1993).

469. *In re Boileau,* 736 F.2d at 506; *see also* 11 U.S.C.A. §1106(b) (1993) ("An examiner appointed under section 1104(b) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform.").

the examiner has the authority to waiver the debtor's attorney-client privilege.[470] Additionally, a court may authorize an examiner to waive the debtor's attorney-client privilege, as was done in the Enron bankruptcy.[471]

B. Liquidators and Receivers

In the late 1980's and early 1990's, many failed financial institutions were taken over by regulators, and various federal agencies became liquidators or receivers for the institutions. The agencies sued the institutions' law firms for assisting the institutions' managers in various frauds. Claiming to stand in the shoes of the institutions, the agencies demanded that the law firms turn over their entire files. When firms resisted on attorney-client privilege grounds, the agencies asserted that they had the right to waive the privilege, thus removing it as an impediment to discovery. In other instances, the government asserted a failed institution's attorney-client privilege in an effort to resist discovery by professionals that it had sued.[472]

From these battles two general rules emerged. First, a liquidator does not succeed to a failed entity's attorney-client privilege, and thus does not have the power to waive it.[473] Second, a receiver does succeed to a failed entity's attorney-client privilege, and thus can waive it.[474] The reasoning behind these different outcomes is that a receiver continues the entity's operations; the entity to which the privilege belongs continues to exist.[475] The receiver functions as a manager, or much like a bankruptcy trustee. That is not the case where a government agency functions as a liquidator.[476] A liquidator takes control of a company's assets for the purpose of disposing of them. "There is no thought or effort to reconstitute the entity or to run it at all."[477] A transfer of an entity's

470. *In re Boileau*, 736 F.2d at 506.

471. Order Pursuant to 11 U.S.C. §§ 1104(c) and 1106(b) Directing Appointment of Enron Corp. Examiner, *In re* Enron Corp., Case No. 01-16034(AJG) (Bankr. S.D.N.Y. Apr. 8, 2002), at 3 ("ORDERED that the Examiner shall have the power to waive, on an issue-by-issue basis, the attorney-client privilege of the debtors' estates with respect to pre-petition communications relating to matters to be investigated by the Examiner hereunder. . . . Such a waiver shall be a limited and not a general waiver. . . .") (on file with the author).

472. *See, e.g.*, FDIC v. Cherry, Bekaert & Holland, 131 F.R.D. 202 (M.D. Fla. 1990).

473. *See* FDIC v. Amundson, 682 F. Supp. 981, 986-87 (D. Minn. 1988); FDIC v. McAtee, 124 F.R.D. 662, 664 (D. Kan. 1988).

474. *See* Odmark v. Westside Bancorp., 636 F. Supp. 552, 554-55 (W.D. Wash. 1986).

475. *See McAtee*, 124 F.R.D. at 664.

476. *See Amundson*, 682 F. Supp. at 987.

477. *Id.*

assets to a liquidator does not transfer the entity's attorney with them.[478]

These rules remain true today, as *Commodity Futures Trading Comm'n v. Standard Forex, Inc.*,[479] demonstrates. In *Standard Forex,* the CFTC sued Standard Forex and several of its former officers and directors. The magistrate on the case appointed a receiver and entered other injunctive relief.[480] The CFTC subpoenaed Standard Forex's law firm, Longo & Bell, to turn over certain documents to the receiver. Longo & Bell resisted on attorney-client privilege grounds, joined by two of the company's former officers and directors, Lao and Feng.[481] The magistrate ordered Longo & Bell to turn over the documents, reasoning that the power to assert or waive the company's privilege rested with the receiver, who was functioning as Standard Forex's management in receivership.[482] Lao, Feng, and Longo & Bell sought review of the magistrate's order by the district court.[483]

The district court noted that its orders appointing the receiver granted him very broad powers, much like the powers granted to bankruptcy trustees.[484] Additionally, the receiver performed many management and legal roles that otherwise would have been performed by the company's former managers.[485] It was therefore obvious that the receiver, and not the former officers and directors, had ultimate control of the company.[486]

Nonetheless, the district court was willing to transfer control of the company's attorney-client privilege to the receiver only if there was a "valid reason" to do so.[487] The CFTC and the receiver supplied the reason:

> The CFTC contends that the Receiver should be granted control over the attorney-client privilege so that the Receiver can assist the CFTC in discovering the truth as to Standard Forex' violation of the Commodities Exchange Act and whether any of the individual defendants directly or indirectly violated the Act. In essence, the CFTC believes that the communications possessed by Longo & Bell may provide evidence on the issue of who actually controlled Standard Forex during the time relevant to this action and who

478. *See McAtee*, 124 F.R.D. at 664 (quoting *In re* Yarn Processing Patent Validity Litig., 520 F.2d 83, 90 (5th Cir. 1976)).
479. 882 F. Supp. 40 (E.D.N.Y. 1995).
480. *Id.* at 41.
481. *Id.*
482. *Id.*
483. *Id.*
484. *Id.* at 42.
485. *Id.* at 43.
486. *Id.*
487. *Id.*

> knowingly induced it to engage in the illegal conduct alleged. The CFTC is especially interested in whether this is true of defendants Lao and Feng. . . . The CFTC also believes that Longo & Bell may have copies of documents relevant to this action. . . .
>
> The Receiver has also indicated that the documents possessed by Longo & Bell contain information that will assist him in taking legal action against certain third parties to recover assets of Standard Forex. This is an essential element of the Receiver's role here.[488]

Although there was no evidence that anyone would be prejudiced by granting the receiver control over Standard Forex's attorney-client privilege, Lao, Feng, and Longo & Bell contended that the privilege had to remain with the corporation.[489] The district court rejected this argument, making the receiver the only party operating Standard Forex.[490] The district court thus affirmed the magistrate's order directing production of the documents at issue.[491]

XI. Conclusion

Many lawyers and clients view the attorney-client privilege as sacrosanct. There is, however, much that the privilege does not protect. As a doctrine, the attorney-client privilege is fraught with exceptions and heavy with the potential for inadvertent waiver. On top of this, the federal government has launched an assault on the privilege in connection with corporate criminal investigations, and recent corporate scandals have raised as an issue the appropriate limits of attorneys' duty of confidentiality. The same concerns that are causing courts, scholars and practicing lawyers to carefully examine the limits of the attorney-client privilege also apply in many cases to lawyers' work product immunity and obligations under state ethics rules.

Now, more than ever, lawyers must understand the many aspects of the attorney-client privilege, work product immunity, and ethical duty of confidentiality. They must understand the problems posed when they engage public relations consultants, they must avoid inadvertent waivers, they must appreciate the confidentiality issues posed by the use of technology in practice, they must realize that a client's cooperation with the government may give rise to selective waiver arguments, they must consider the effect of cooperation clauses in their clients' insurance policies when asking their insurers to defend them in litigation, and so

488. *Id.* at 44 (footnote omitted).
489. *Id.*
490. *Id.*
491. *Id.* at 45.

on. Lawyers' important duties to preserve clients' confidences, which have always required great diligence and caution on lawyers' parts, are becoming harder to satisfy in a changing legal climate.

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